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UNANIMOUS JURY VERDICTS IN CRIMINAL CASES
William Haralson

THE JUDGE ADVOCATE GENERAL'S CORPS OF THE UNITED STATES ARMY
A. B. Butts

CONGRESS AND THE *Church* AND *Spiegel* CASES
Harold G. Wren

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March, 1950

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Mississippi Law Journal

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UNANIMOUS JURY VERDICTS IN CRIMINAL CASES

*William Haralson**

But faith, fanatic Faith, once wedded fast
To some dear falsehood, hugs it to the last.

Moore

The veto[1] provision of the United Nation's Charter has been bitterly criticized. At times, its use or rather abuse by the Soviet Union has brought the machinery of the United Nations to a temporary standstill. In a recent attack, one of its members exclaimed: "The one nation one vote rule must be abolished."[2]

Yet few people seem to realize that this same undemocratic veto has been embedded for centuries in our jury trials—and Justice has been stumbling over it ever since. While it is true that in recent years many of the states have provided for less than a majority verdict in civil cases, all but a few retain this arbitary rule as to criminal trials. In the federal courts[3] the unanimous verdict is required in civil as well as criminal trials.

How did the unanimous verdict originate? Why do we still retain it? Should this rule be changed? If so, how? To answer these questions we must take some "flash-backs" into the history of jury trials.

In making this exploration we are confronted with the strange fact that the most fundamental institution of our law, the jury, is obscured in the debris of judicial history. Those who have undertaken to dig away the ashes of the past have been able to uncover only the broken columns of this great edifice of the law. When located, the separate parts are found

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*County Judge, Forrest County, Mississippi; LL.B. 1921, University of Mississippi.

[1]Webster's Twentieth Century Dictionary (Unabridged) (Latin *veto,* I forbid, from *vetare,* to forbid). In ancient Rome, the power possessed by the tribunes of the people of interfering so as at once to put a stop to any measure which they deemed injurious to their order, this power being exercised by pronouncing the solemn word veto.

[2]Carlos P. Romulo, Permanent Representative of the Republic of the Philippines to the United Nations, in a speech before Committee I (Political and Security Committee) (Nov. 16, 1946).

[3]U. S. Const. Art. III, § 2; U. S. Const. Amends. VI and VII.

scattered about, carried hither and yon by its adherents. These difficulties make the search for the origin of the jury system all the more interesting.

The material uncovered on this subject includes the crude methods for determining justice in ancient days, the origin of the number twelve for the jury, how the unanimity rule "got that way" and the modern trend back to the majority principle. But no effort seems to have been made to focus the light from these discoveries upon the question as to whether or not the unanimous verdict should be retained. Nor, apparently, has there been any concern to point out the obvious lack of correlation between the percentage of votes required to pass a law (legislation) and the percentage of votes of the jurors necessary to enforce that law by conviction (judicial). This article is an attempt to bridge such gaps. The discussion will deal with the jury in criminal trials, misdemeanors and felonies. The jury in civil trials will be adverted to only when necessary.

When one is examining the facts about juries, it is well for him to bear in mind the observation of Artemus Ward that: "Ignorance is not in not knowing things, but in knowing so many things that are not so." In making this research it has been found, in several instances, that tenets which have been accepted currently as facts concerning the jury system are incorrect. For example, it is a common belief that the Magna Carta provided for trial by jury. This is a popular misconception which along with other revelations will appear hereinafter.

First Juries

Like many other institutions of Democracy, the first juries were found in ancient Greece. There 200, 300, and sometimes, in cases of great importance, as high as 1500 jurors were used. In that agreeable climate these mass-jury trials were held outdoors; in a Greek comedy, the "Clouds", a visitor in the clouds when shown the City of Athens on the map, says: "I don't believe it, for I see no juries sitting." According to Aristotle, the party having a bare majority of the votes of the jury was declared the winner; but if the votes were equal the verdict was for the defendant.

The Romans were not given to such extravagance. The Judices, or jury, had eighty-one members at the first ballot, but this was reduced to fifty-one by challenge. The odd juror could determine the issue when there was a tie vote.[4]

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[4] Pettingal, An Enquiry into the Use and Practices of Juries Among the Greeks and Romans (1769).

First Methods of Ascertaining Guilt Under Our System of Law

The Anglo-Saxons did not use juries for many centuries after their appearance among the Greeks and the Romans. In fact, there was little in common between the two systems.

Prior to the development of our jury system, three classic methods were used to settle the matter of guilt or innocence in early Anglo-Saxon society. They were trial by battle, the ordeal, and compurgation.

Trial by Battle

In the trial by battle the injured party or a near relative met the offender, and justice was deemed satisfied by the outcome of the conflict. At times the battle was done by hired champions of each side. This was a considerable improvement on blood-feud, as it ended the reprisal slayings. However, as the best warrior was likely to win, he thus not only escaped punishment but added to his crimes. This spirit of contest rather than that of calm investigation, unfortunately is still retained in our present procedure.

The Ordeal

In reading of this barbarous method of trial one is apt to get the erroneous impression that the innocence of the accused depended on whether he came through the ordeal, such as carrying a piece of hot iron, without any injury whatever. However, if a man's hand healed rapidly after he had carried such an object he was declared innocent, rather than if he came through unharmed (which would have been quite impossible).

The ordeal, in turn, was considered an advance over the duel in such cases. The ordeal was based upon the mystical conception that God would assist the innocent. As one writer remarks, the theory was not entirely erroneous in either the duel or the ordeal, since one could fight or bear torture with better grace if innocent than if guilty.

Compurgation

According to Barnes the method of compurgation was also widely used. It came closer to modern methods than any other. The person accused gathered together a group of reputable kinsmen or neighbors known as compurgators. They did not, as might be supposed, swear that they believed the defendant innocent. The defendant first took an oath that he was innocent. Then the compurgators swore that they believed the accused was telling the truth.[5]

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[5]Barnes, The Story of Punishment (1930).

Future Methods of Trial

With the experience of ages behind us, we can now look with disdain on such elementary methods as trial by combat, the ordeal and compurgation. But should we rest contented with what we have today? Certainly we cannot say that perfection has been reached. For example, the comparatively new codes under which children are brought before the courts reflect radical concepts of justice. A child is usually defined legally as a person under 18 years of age. If such a person's occupation, behavior, environment or associations are found to be injurious to his or her welfare or that of other children, such person can be deprived of liberty and placed in a correctional institution[6] without conviction of any particular offense. When adults conduct themselves so as to endanger the welfare of others is there any good reason why this same procedure should not be applied to them? As startling as it may seem, in time we may expect our anti-social fellow citizens to be tried on their character or behavior, rather than for any particular crime. While it is not within the scope of this article to discuss the details of this facet of trials, it has most interesting possibilities.

As To The Origin Of The Number Twelve

As we resume our search for historical facts respecting the jury system, one of the first relics we find that arouses our curiosity is the fact that the jury was composed of exactly twelve men. Some of the reasons given by historians are that twelve seems to have been the favorite number constituting a court in the Scandinavian countries; that under the Anglo-Saxon policy the twelve senior thanes were to go out and the reeve,[7] or sheriff, with them, and swear on the relic given them in hand that they would accuse no innocent man; and that the number of compurgators in cases of importance was usually twelve.[8]

However, the reason most frequently given and the most widely accepted is the one attributed to a Lord Somers. He is quoted by Forsythe, as follows:

> Of late the jury is reduced to the number of twelve, like as the prophets were twelve, to foretell the truth: the apostles twelve, to preach the truth; the discoverers twelve sent into Canaan to seek and report the truth; and the stones twelve, that the heavenly Hierusalem is built on; and as the judges were twelve anciently to try and determine matters of law; and always, when there is any waging law, there must be twelve to swear in it; and also as for

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[6]Miss. Laws 1946, c. 207, § 1(g); Miss. Code § 7185-02(g) (Supp. 1948) (Youth Court Act).

[7]1 Anderson, Sheriffs Coroners and Constables § 2.

[8]Forsythe, Trial By Jury (1875).

> matters of state, there were formerly twelve councilors of state. And anything now which any jury can be said to do, must have the joint consent of twelve, else it is, in construction of law, not the doing of the jury, but of private persons, and void.

This "apostolic" theory of the number of jurors (whether correct or not) persists throughout. As late as 1910 we find a report stating that it seems the sacred number twelve has for its main foundation the fact that the number of apostles and the original number of the Jewish tribes was twelve.[9]

Magna Carta And Jury Trials

One of the most persistent fallacies is that Magna Carta provided for trial by jury. This appears to result from the erroneous impression that the *judicium parium* or "trial by one's peers" referred to the jury. It is said to have misled many scholars, including Blackstone. The *pares* (peers) meant equals in rank or station. However, it had no reference to a jury, but to judges, as may be learned from the following observations by Chief Justice Clark of the North Carolina Supreme Court:[10]

> The King's judges were not peers of the barons and therefore this much misunderstood stipulation was a contract for their protection that they should be tried, both civilly and criminally, by their peers and not by the king's judges.
>
> It may be repeated that the much vaunted doctrine that trial by jury was guaranteed by Magna Carta, which was agreed to be June 19, 1215 A. D., is without the slightest foundation in fact. There was no grand jury until about forty years before when it was established in a crude form by the Assizes of Clarendon in 1166, and there was no such thing as trial by a petty jury until 135 years after Magna Carta in 1351, and at first the juries were composed of the witnesses to the crime. They were not limited even then, at first, to 12 in number, *nor was unanimity required.* (Italics added).

As an illustration of the persistency of outmoded legal procedure, Justice Clark then calls attention to the well known English case of *Ashford v. Thornton.*[11] Thornton murdered a young girl by drowning her. Upon being charged with the murder, he demanded his wager of battle.

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[9]Report of Section of Reform of the Jury System, Bar Ass'n. of San Francisco (1910).

[10]Clark, Magna Carta and Trial by Jury 26, 28, 29 and 30 (Reprinted from the Am. L. Rev., Jan. Feb. 1924).

[11]1 B & Ald. 405 (K.B. 1818).

The court after the fullest discussion held in 1818 that the defendant was entitled to trial by battle. However, the girl's brother, not being impressed by this chivalric albeit dangerous mode of trial, refused the challenge. Lord Ellenborough, Chief Justice, then announced that the general law of the land was in favor of the wager of battle; that it was the duty of the court to pronounce the law as it is and not as it may wish it to be. "Whatever prejudice may therefore exist against this mode of trial," he commented, "still as it is 'the law of the land' the court must pronounce judgment for it." Whereupon Thornton was discharged.

Origin Of The Unanimity Rule

The next proposition we examine is the principle that all twelve jurors must agree before rendering a verdict.

In considering the origin of the unanimity rule, it must be kept in mind that in the process of the development of our jury system one of the initial steps taken in any controversy was that of determining whether or not a charge should be brought against a person suspected or accused of a wrong. This was usually done by having at least twelve men agree to the charge. If necessary, sufficient investigators were added to the panel until at least a dozen were found who would agree. This agreement then became the verdict of the group. In the misty sunrise of our jury system witnesses informed the court of facts supposed to be within their knowledge. To require at least twelve of them to agree was simply to fix the amount of evidence which the law determined to be conclusive of a matter in dispute.[12] This idea still prevails in our present inquisitorial body, the grand jury. While composed of not less than fifteen nor more than twenty men,[13] no true bill or indictment can be brought against an accused unless at least twelve agree to it.[14]

The next step in the evolution of our jury system was to require twelve men, not to give evidence, but to hear the facts and determine their truth or falsity. It was then that witnesses were brought in to give the facts and not their conclusions on the facts.

It would have been interesting as well as helpful if the historians of the law had given some definite reason for the change to the unanimous verdict. However, a determined research has failed to reveal that they were interested in this question; or, if so, that they took the pains to note it. Only this bald assertion can be found:

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[12] *Supra* note 8.
[13] Miss. Code § 1779 (1942).
[14] *Id.* § 2440.

> Thus, although as late as 1346 the verdict of a majority was taken, it was finally settled in 1367 that the verdict must be unanimous.[15]

It is worth noting that from the beginning until as late as 1346 the verdict of a majority of the jurors was accepted as the decision of the whole. Why was the change made? One suggestion is ventured by the writer which has good reason for support. It was not until the eighteenth century that "cruel and unusual" punishment was abolished.[16] In the fourteenth century, when the rule was changed requiring the verdict to be unanimous, the penalty for nearly every offense was extremely harsh and cruel. For what are now considered trivial violations the punishment was usually death or the maiming of a person such as the cutting off of an ear, or being painfully branded with hot irons. Furthermore, the defendant in those days was not surrounded with all of the legal safeguards of a fair and impartial trial, nor were the rules of evidence framed to benefit the accused. The judges of those days were among the learned and enlightened. Also, some of them were no doubt ecclesiastics. Thus it was that they were more humane than the king and his counsellors or others who enacted these harsh measures to repress crime. Furthermore, in those days the judges made their own rules. All of these conditions no doubt influenced the judges to give every advantage within their power to the accused. It is not to be expected that they would make such a radical change from mere whim or fancy. To require a unamious verdict was a great boon to the one being tried, which was no doubt justified at that time.

But since those medieval days conditions have changed radically. Now, the accused is surrounded with every safeguard. His punishment is no longer considered harsh. The constitution itself guarantees him against unusual and barbarous punishment.[17] In fact, the present tendency is towards reformation, with punishment only as a necessary incident.[18] Thus the reason to give the accused "a break" by requiring a unanimous verdict no longer exists. In fact, it is now just the reverse.

Reasonableness Of The Unanimity Rule Considered

At an early date students of the law began to criticize the rule requiring all members of the jury to agree on a verdict. Among the first to register disapproval of the unanimity rule was Bentham,[19] an English jurist and philosopher. He is quoted by Forsythe[20] as follows:

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[15] 1 Holdworth, History of English Law 318 (1922).
[16] *Supra* note 5.
[17] U. S. Const. Amend. VIII.
[18] Barnes and Teeters, New Horizons in Criminology 646 (1889).
[19] Jeremy Bentham (1748-1832).
[20] *Supra* note 8.

> If the work of forming verdicts has been the work of calm reflection working by the light of experience, in a comparatively mature and enlightened age, some number, certain of affording a majority on one side, viz., an odd number, would on this, as on other occasions, have been provided; and to the decision of that preponderating number would of course have been given the effect of the conjunct decision of the whole.

Later, Lieber, an esteemed writer of his day, wrote in 1877:[21]

> Perhaps more professional men adhere to the unanimity principle; but reforms rarely proceed from the profession, in any sphere. It was not the theologians of the Pope from whom the Reformation proceeded. We can add, however, high authority in favor of our opinion. In January 1839, Lord Campbell, chief justice of England, declared in court, after the jury had pronounced an absurd verdict, which he declined accepting, that he intended to prepare a bill, in parliament, for the purpose of adopting the majority principle in civil cases; and while I am revising these pages, a very respectable petition, urged even by judges, to allow judges to decide in civil cases by the majority of jurymen, when they cannot agree on a unanimous verdict, was presented to the Massachusetts Legislature. *I consider, however, the principle of verdicts by two-thirds in penal cases even more important than in civil cases.* (Italics added).

Lieber adds that Locke, in his constitution for South Carolina, proposed that every jury consist of twelve men, and that the verdict should be according to the consent of the majority.

Kinds of Jurors

If, as already set out herein, the number twelve was chosen because of its religious significance, this is not to be taken as any argument in favor of unanimity. There are too many instances of the failure of the "apostolic twelve" to agree among themselves. Their conduct often reflected their human weaknesses. To illustrate, we only have to recall that Thomas doubted Jesus,[22] Peter denied Him,[23] and Judus actually betrayed the Saviour.[24] In view of these manifestations of weakness among the disciples, is it to be expected that it would be less difficult in modern times to pick twelve devotees of truth and honesty out of the grab bag of a jury box?

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[21]Lieber, On Civil Liberty and Self Government 238 (3d ed. 1877).
[22]John 20:25.
[23]John 18:26, 27.
[24]John 6:70, 71.

Despite the statutory provisions in Mississippi for selecting jurors, it is too much to expect the supervisor to cull out all of the unfit.[25] For instance, a juror is not disqualified by age, although he may claim exemption from jury duty by reason of being over sixty years old. Many elderly jurors make the best triers of facts; but there are always some who by reason of senility are incapable of satisfactory jury duty.

Then there is always to be found among jurors the individual who, while he meets the technical qualifications, is nothing more or less than a moron; and there is the stubborn juror, who simply goes contrary to any group; and we still have some triers of fact who are positively corrupt, though these are fortunately less frequently present than the stubborn.

In addition to the above classes, there is the juror who makes his living in a sub-rosa manner. He is among the six million criminally inclined individuals in this country mentioned by J. Edgar Hoover. Nevertheless, many of them can meet the technical qualifications of a juror. Such a person is fundamentally against any vice law for the simple reason that it militates against his earning an easy living.

Is it not enough that such citizens are permitted to sit on a jury and voice their often unenlightened and sometimes corrupt opinions without, by their one vote, binding the whole jury?

Anti-Social Acts And The Unanimous Verdict

In determining the effect of unanimous verdicts in criminal cases, we must better understand the nature of the laws against activities inimical to the social order. For instance, gambling, violations of liquor laws, and prostitution, are among the chief vices condemned by law. To coin a phrase, they might be designated as the "sintriplicates." These vice laws represent real progress in human society. It did not take much imagination to enforce a rule of law based on the Biblical rule of justice: "An eye for an eye and a tooth for a tooth." Even the savage could understand this elementary principle of retribution. But our forbears never considered the causes of crime. Only recently have we concluded that it might be well to stress preventive measures. This attitude helped to bring about laws to suppress vice.

Furthermore, we are now entering into an even broader field, in which the deleterious acts of a few are sought to be restricted in the interest of many. Traffic violations, charging over the price ceiling, paying less than minimum wages, desertion of minor children, driving under the influence of intoxicating liquor, and safety violations, to mention a few, might be classified together with vice as anti-social acts.

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[25]Miss. Code § 1766 (1942).

The Impersonal Nature Of Anti-Social Laws

Now, such statutes for the protection and advancement of the social order differ very much from the criminal laws of the past. As we have learned already, in the olden days when a law was breached it meant that some individual was the victim. But the violation of anti-social acts of today very seldom involve injury or wrong to any particular individual—the harm is to the people in general.

Perhaps the idea can be made clearer by an illustration. A person is held up on the street and $100.00 is taken from him. This is highway robbery. It carries a severe penalty. If done with firearms, it may result in the death penalty. Now the process of reasoning which brings about this drastic punishment is something like this. Citizen Jones has lost $100.00 in a rather rude way. The jurors sympathize with him, not so much in his loss, but in the manner in which he lost it. All of them are quite ready to convict his assailant. But suppose Citizen Jones chooses a little excitement and he visits one of community's gambling places. He might, and probably will, lose several times $100.00. Under the law his loss is by an illegal act. His wife and children might go without food and clothing (with its concomitant of delinquency) if these losses are continued. Or, it might happen that Citizen Jones will become involved in a dispute in the gambling place and either kill someone or be killed. All of these considerations no doubt prompted the progressive elements of the legislature to outlaw such anti-social activities.

However, when an effort is made to convict the operator, as the law contemplates, we have quite a different situation. It is now that the wide difference between the enforcement of the orthodox criminal law and the anti-social law becomes more apparent. Those individuals who are harmed by the operation of the gambling place are not before the jury. Some jurors, either through ignorance or because of more sinister reasons, are blinded to the purposes of the legislature. No amount of competent evidence will induce such jurors to convict. In other words, when the legislature can pass a law by a bare majority and then to enforce it a unanimous verdict is required, this brings about a situation which enables the minority to block the best efforts of the majority. Indeed, it is worse than that. *It enables any one of twelve jurors to veto the decision of eleven other citizens and the expressed will of the people as reflected in the acts of their law makers.*

Mechanically Speaking

To those mechanically inclined, the situation might be understood better by this comparison. Let 100 per cent represent unanimity or complete accord in the legislature as well as in the jury box. A given law is passed by the decision of 65 per cent of the lawmakers. It can then be

said that the legislative gear has sixty-five teeth in it to represent accord. But when this same law comes to the test, that is, has to be passed upon by a jury, the decision must be unanimous or 100 per cent. Thus the judicial gear requires one hundred teeth in it to represent accord. When the attempt is made to mesh a sixty-five tooth (legislative) gear with a one hundred tooth (judicial) gear, there is going to be a great deal of noise and friction but very little turning of the wheels of justice. And that is just what takes place when many of our laws meet the criterion of a jury verdict.

How The Average Juror Feels About It

But this is not all of the bad consequences of such an absurd situation. A busy citizen is summoned into court; he hears the evidence in the case; and with a majority of the jury he is clearly convinced that the law has been violated or has not been violated. After his wearisome sitting on the jury he goes into an even more tiresome deliberation with his fellow jurors. Although the majority, or even all except several, have reached a conclusion, they find that there are those among their number who do not concur with them. No amount of persuasion can change the situation. The few, unless they choose to do so, need not even give a reason for their position. The jury reports to the judge that they cannot agree. Hoping to avoid the trouble and expense of another trial, the judge sends the jury back for further deliberation. But, sooner or later, in too many instances, he is forced to enter a mistrial and discharge the jury. After the day's work is over, some member of the jury, unable to restrain his feelings, will express his resentment of the unanimous verdict. He thinks that his time and the taxpayer's money is being wasted, which is true. He has a feeling of frustration and is convinced of the hopelessness of ever enforcing any progressive legislation in the face of such a system.

Does The Jury Also Legislate?

As has been mentioned above, the legislature can pass a law by a bare majority, unless vetoed by the Governor.[26] Needless to say, in the passage of any law, there is virtually always opposition. However, this adverse sentiment is overcome in the legislature by the final vote of one more than half. Let us take for example a law suppressing gambling. While nearly everyone is in favor of such law there is always an active minority, perhaps influenced by the prospects of easy profits from this vice, who are opposed to such legislation. One would think their fight lost when this act becomes a law. However, the real test is yet to come. The legislature has only said that a certain act violates the law. Someone

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[26]Miss. Const. § 72.

must be charged with the offense and, of course, the matter is finally passed upon by a jury. This is the real test of whether or not the law is enforceable. Every member of the jury must be convinced beyond a reasonable doubt of the guilt of the defendant. Furthermore, as a matter of fact, they must also be of the opinion that the particular law involved should be enforced. Of course, the jurors all take an oath to decide the case on the law and the evidence. But anyone with any practical experience in the trial of cases knows that there are many mental reservations to the taking of such an oath. It is possible that 35 per cent of the members of the legislature saw fit to vote against this law. They certainly were representing some constituents who also were opposed to it. Human nature being what it is, this is the opportunity for this minority (now represented in the jury box) to register its opposition notwithstanding their oaths. Of course, many jurors who do not favor this statute would never admit even to themselves that they are going contrary to their oath. To them, the evidence just does not warrant a conviction. The result is that any one member of the jury can thus nullify the judgment of the rest of the panel. There is always an element of legislation in the decision of a jury. To say otherwise is to run counter to experience.

It is not the comparatively few cases wherein the jury fails to agree that makes the difference. It is the bare fact that all twelve of the jury must agree that causes the mischief. The state (representing the majority of the people pressing for social legislation) must ever bear this in mind. The law violator takes this into account when he wilfully breaks the law. The criminal lawyer knows this is his trump card in the event of a trial. The state realizes that even one juror can block its best efforts to carry out the will of the legislative majority. Therefore, unless the case is as "strong as horse radish" there is usually a compromise. As a consequence, the guilty man takes a small fine instead of the heavy penalty contemplated by the law maker. In effect, the law violator is not suppressed, but simply licensed. Thus the rule of unanimity thwarts the enforcement of the law without even entering the jury box.

Estimate of Savings

The following figures cover a period of about ten years.

Misdemeanors—Forrest County
Jan. 1, 1934 to Sept. 1, 1944

Total misdemeanor cases submitted to jury	155
Total disagreements	36
Disagreements or mistrials	18.8%

The average annual expense for the Forrest County Court from 1935 to 1940 (both inclusive) was $3,527.00. During this period jurors were

paid $3.00 per day; now they get $5.00. This would increase the expenses to at least $5,000.00, just to take an even figure. This covers fees of jurors, their mileage, witnesses, clerk and sheriff. It does not include the fixed expenses of the judge and court reporter. These fixed expenses would be affected but little by retrials. The clerk estimates that one-half of such variable expenses for a year is due to criminal matters, or $2,500 00. This sum multiplied by 18.8 per cent (the percentage of mistrials) amounts to $470.00, or the estimated savings to Forrest County in one year if mistrials were virtually eliminated. Of course, a few cases would result in mistrials even if agreement of all jurors was not required.

The population of Forrest County has been about 30,000; that for the state about two million. On this basis, the approximate savings each year in the entire state would be $31,020.00. This sum could provide the state with a sufficient number of competent youth counselors for the recently created youth courts, as well as provide funds for setting up a much needed department of adult probations. Furthermore, it is believed that the number of misdemeanors tried would be reduced by at least one-fourth, if less than all twelve jurors could decide a case. The hope that one or more of the jury can be persuaded to "hang" the jury encourages the demand for jury trials. Thus the above savings would be practically doubled, amounting to $62,040.00. Furthermore, as an additional saving, the law could be changed as in other states to allow for less than twelve jurors in misdemeanor cases, as well as provide that fewer than the full panel could decide the issue. And there is no good reason why a six man jury could not decide civil cases (say when $1,000.00 or less is involved) with less than all having to agree. In federal courts, civil as well as criminal verdicts must be unanimous. Thus millions of dollars each year are lost to the taxpayers down this judicial "drain."

Before leaving the subject of economy in trials, the following figures are submitted as a matter of interest:

Felonies—Forrest County
Jan. 1, 1934 to Sept. 1, 1944

Total felony cases submitted to jury	140
Total disagreements	12
Disagreements or mistrials	7.89%

It is readily observed that in felonies there are fewer mistrials. But of course, it is more expensive to retry felony cases, for the principal reason that they require a longer time.

The Law In Mississippi

Section 31 of the Mississippi Constitution provides:

> The right of trial by jury shall remain inviolate, but the legislature may, by enactment, provide that in all civil suits tried in

> the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury.

Accordingly, our legislature has provided that in civil trials nine or more members, out of a jury of twelve, may agree on a verdict.[27] There is thus left intact the provision that in criminal cases, in misdemeanors as well as felonies, the accused can demand twelve men for a jury; and all of them must agree before a verdict can be rendered. While only six jurors are used in justice courts,[28] by appealing to the circuit or county court[29] a full jury of twelve may be had.

In Other Jurisdictions

First, let us examine the basic law of our country.

> The Trial of all Crimes, except in Cases of Impeachment shall be by Jury. . . .[30]

And, to criminal cases the Sixth Amendment to the United States Constitution provides:[31]

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

Crimes differ from misdemeanors. It will be noted that the above provisions do not mention misdemeanors. Murder, robbery, arson, assault and battery with intent to kill, and burglary are examples of crime. Simple assault, petty thefts, gambling, reckless driving and carrying concealed weapons are usually classified as misdemeanors. It is thus obvious that the Federal Constitution does not require a jury in petty offenses, much less provide that the verdict be unanimous.[32] But nearly all of the states go a step further, and not only require juries in the trial of misdemeanors but that all the members thereof must agree on the verdict. However, there are some notable exceptions, as we shall presently see.

So accustomed are we to the jury systems of Mississippi and the Federal Government that few realize other states have made changes, resulting in saving time and money.

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[27]Miss. Code § 1801 (1942). This statute was held to be valid in Ulmer v. Pistole, 115 Miss. 484, 76 So. 522 (1917).

[28]*Id.* § § 1836, 1839.

[29]*Id.* § 1615.

[30]U. S. Const. Art. III, § 3.

[31]U. S. Const. Amend. VII, provides, as to civil cases, that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

[32]District of Columbia v. Colts, 282 U.S. 63, 72 (1930).

Idaho

Pursuant to Article I, Sec. 7 of the Idaho Constitution the legislature of that state enacted a law reading:

> Trial by Jury . . . . In case of misdemeanor the jury may consist of twelve or any number less than twelve upon which the parties may agree in open court, but five-sixths of the jury may render a verdict, which verdict shall have the same effect as a unanimous verdict.[33]

In a letter dated February 10, 1947, Acting Dean W. J. Brockelbank of the College of Law at Boise commends this law as follows:

> As you see, we may use any number if both parties agree to less than twelve, and the practice in Idaho is to use six jurors in misdemeanor cases. The law certainly does save time and expense. This law is also an improvement over the requirement of a unanimous verdict because with six jurors a verdict may be given by five who agree, and that leaves room for one stubborn fool to hold out against the others.

Montana

The Constitution of Montana provides that:

> In all civil actions and in all criminal cases not amounting to felony, two-thirds in number of the jury may render a verdict, and such verdict so rendered shall have the same force, and effect as if all of such jury concurred therein.[34]

Dean C. W. Leaphart of the Law College at Missoula, in response to a question submitted to him replied: "I believe that the opinion of almost all lawyers is that our law is an improvement over the old law which required a unanimous verdict in all criminal cases." He stated further that the new law saved both time and expense.

Oklahoma

Prof. W. B. Swinford, of the School of Law, at Norman, Oklahoma, says he thinks "the bar generally feel that the provision is wise." He has reference to the constitution of that state, which provides that in criminal

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[33]Idaho Code Ann. § 19-1802 (1932).
[34]Mont. Const. Art. III, § 23.

cases less than felonies, three-fourths of the jurors concurring shall have power to render a verdict.[35]

Louisiana

The neighboring commonwealth of Louisiana has departed from tradition to a greater extent than any of the others.[36]

Hon. Michael E. Culligan, Special Assistant Attorney General, makes the following analysis of the law of his state on this subject:

> In Louisiana misdemeanor cases are triable by a judge alone, there being no jury in such cases.
>
> Our felony cases are divided into three classes.
>
> In the first class of cases the punishment is by death or imprisonment for life, and, of course, the jury has a right to render certain responsive verdicts in particular instances. In this class of case, either to render a verdict of guilty of the major crime or of any of the responsive verdicts, the verdict of the jury must be unanimous. First class cases are tried by a jury of twelve.
>
> Second class cases are cases in which the punishment is necessary by imprisonment at hard labor in the penitentiary. In that type of case, the trial is by a jury of twelve, nine of whom must concur to render a verdict.
>
> The third class of felony cases are those offenses in which the punishment is either with or without hard labor in the discretion of the judge. In that type of case, the defendant has the option to be tried by the judge alone or to be tried by the jury. If he elects trial by jury, such jury is composed of five members, all of whom must concur to render a verdict.
>
> In the 1946 Session of the Legislature, a bill was introduced endeavoring to abolish the five-man jury. This bill died in the committee.

What The Conference of Mississippi Judges Proposes

The Judicial Council of Mississippi, at its two past annual sessions, without a dissenting vote, recommended to our legislature that nine of twelve jurors be permitted to decide cases involving misdemeanors.

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[35]Okla. Const. § 19.
[36]La. Const. Art. VII, § 41.

The American Law Institute in its Code of Criminal Procedure, on page 137, recommends:

> Section 335. Number of jurors concurring necessary for a verdict. In capital cases no verdict may be rendered unless all the jurors concur in it. In other cases of felony a verdict concurred in by five-sixths of the jurors, and in cases of misdemeanor a verdict concurred in by two-thirds of the jurors may be rendered.

Conclusion

From the foregoing we learn that at first the jury was not required to be unanimous in its decision. The reason for the change to complete accord in 1367 is not revealed. It might be, as herein suggested, that the cruel punishments prevailing at that time justified the judges in requiring complete assent of the fact-finding body. However that may be, today the principle of unanimity stands as an anachronistic asininity.

If it is contended that no man should be convicted of an offense unless all the jurors agree, should not the same reasoning be applied to the decision of the judges? Yet on an appeal, a bare majority of the appellate judges decides questions of law. Is it not difficult to understand why we should insist upon complete accord on the facts, and yet not require the same with respect to the application of the law?

For many years we have promoted both economy and justice in Mississippi by providing for nine out of twelve jurors to decide civil cases. Yet the rights of a citizen involving millions of dollars are not considered prejudiced by such an arrangement; while the decision in a criminal proceeding wherein the fine might be the matter of only a few dollars requires that all jurors agree. Consistency, thou art indeed a jewel!

In our federal and state governments, generally, a law is passed by a bare majority. The veto of the president, for that matter, can be overridden by a two-thirds vote.[37] Even our state constitution may be altered by a majority of the qualified electors voting.[38]

Private assemblies, boards, *et cetera,* decide matters of the gravest consequences by a decision of the majority. In such bodies, the solemn provisions of constitutions and by-laws are usually changed by not over a three-fourths vote.

In the light of these incontrovertible facts, should such an absurd principle as unanimity in a jury verdict be tolerated longer? Indeed, this

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[37]U. S. Const. Art. I, § 7.
[38]Miss. Const. § 273.

"preposterous relic of barbarism" must be condemned as one of the greatest obstructions to the enforcement of our anti-social laws and therefore a positive hindrance to social advancement.

Some think we should do away with the jury altogether. Before taking such a drastic step, would it not be well to change the unanimity rule? Before getting a new automobile let's try adjusting the carburetor. By the simple expedient of permitting less than all members of the jury to return a verdict the machinery of justice will function more efficiently, with less expense and greater justice to all.

THE JUDGE ADVOCATE GENERAL'S CORPS OF THE UNITED STATES ARMY

*A. B. Butts**

Introduction

On February 1, 1949, the new Judge Advocate General's Corps of the United States Army was established.[1] On that same day the revised *Manual for Courts-Martial* embracing the amended Articles of War became effective.[2]

The first Judge Advocate of the United States was appointed July 29, 1775.[3] Hence the office antedates the Declaration of Independence and the Constitution of the United States. When the Continental Congress adopted the Articles of War in June, 1775, a judge advocate was empowered to prosecute in the name of the United States or to conduct such prosecutions by deputy.[4]

The Judge Advocate General's Department dates from the Act of Congress, approved July 5, 1884.[5]

Under the terms of Title II of the Selective Service Act of 1948 the Judge Advocate General's Department of the Army became the Judge Advocate General's Corps.[6]

A much larger Judge Advocate General's Corps became necessary to meet the responsibilities imposed by the revision of the articles. Until the new act became operative, the Judge Advocate General's Department had

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[1]This is the third article on the subject of military courts and the administration of military justice by the author to appear in the *Mississippi Law Journal.* See Butts, *The Judge Advocate General's Department of the United States Army,* 15 Miss. L.J. 113 (1943); Butts, *How the Army Transforms Lawyers into Judge Advocates,* 16 Miss. L.J. 21 (1943). The author is indebted to Lt. Col. Charles L. Decker, of the Office of Judge Advocate General, for valuable assistance in the preparation of this article.

[2]U. S. Army, Manual for Courts-Martial (1949). This manual is, in effect, the criminal code of the Army.

[3]William Tudor, elected by the Continental Congress. See 5J1s Cont. Cong. 645 (1776).

[4]Military Laws of the United States § 62 (8th ed. 1939). See also Winthrop's Military Laws and Precedents 21 (Reprint 1920).

[5]23 Stat. 113 (1884). Special Regs. 10-224-1, § II (Dep't Army 1949). See Military Laws of the United States §§ 62 and 64 (8th ed. 1939); Fratcher, *Notes on the History of the Judge Advocate General's Department,* 1 The Judge Advocate Journal 5 (1944).

[6]62 Stat. 643 (1948), 10 U.S.C.A. § 61 (Supp. 1948).

a peacetime authorized strength of "one Judge Advocate General with the rank of major general and one hundred and twenty-one officers in grades from colonel to captain, inclusive."[7] No officer below the rank of captain was commissioned in the department, though first and second lieutenants of other branches of the service with legal training could be assigned to duty with the department. The department had no enlisted personnel. Warrant officers and enlisted personnel, however, were detailed as clerical assistants.

Personnel

Before the new Articles of War became effective on February 1, 1949, the Judge Advocate General's Department had never had a sufficient number of officers to handle properly the Army's legal problems, even with the aid of other officers with legal training assisting in the work of the department.

At the outbreak of World War II, December 7, 1941 (Pearl Harbor Day), there were only ninety-two officers in the regular Army Judge Advocate General's Department and approximately 500 reserve judge advocates. By November, 1945, there were 2828 judge advocate officers on active duty. Even this was in great contrast to the situation as it existed when the United States entered World War I, on April 6, 1917, when the total strength of the Judge Advocate General's Department was seventeen officers.

Under the terms of the act of June 3, 1916 the strength of the department had been increased to include a total of thirty-two regular judge advocates, the increase to be made in five annual increments. By December 2, 1918, there were 426 Army judge advocates. Thirty-five of these were regular Army judge advocates and 391 were in the Officers' Reserve Corps and National Army.

The Judge Advocate General's Corps now consists of one judge advocate general with the rank of major general, one assistant judge advocate general with the rank of major general, three officers with the rank of brigadier general, and an active list of commissioned officer strength[8]

> to be determined by the Secretary of the Army, but such strength shall not be less than 1½ percentum of the authorized active list commissioned officer strength of the Armed Services of the National Military Establishment who are subject to the Arti-

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[7]Army Regs. 25-5 (1942).
[8]62 Stat. 643 (1948), 10 U.S.C.A. § 61 (Supp. 1948).

> cles of War, and in addition warrant officers and enlisted men in such numbers as the Secretary of the Department of the Army shall determine.

The officers of the Judge Advocate General's Corps now rank from major general to first lieutenant. The number of regular Army judge advocates on January 1, 1950, was 325, in addition to which number, fifty-seven other regular Army officers were enrolled in law schools and upon graduation and admission to the bar will be regular Army judge advocates, making a total of 382. In the regular Army the authorized strength is five officers of general officer rank (two major generals and three brigadier generals) and, based upon the percentage figures of the act under which the corps is organized, in addition to the five general officers, in January, 1950, the number of regular Army judge advocates on duty and their permanent ranks were as follows: 17 colonels, 103 lieutenant colonels, 130 majors, 18 captains, 52 first lieutenants. Approximately one-fourth of these officers held temporary ranks of one grade above their permanent ranks. Under the new authorization for warrant officers and enlisted personnel, there were twelve warrant officers and no enlisted personnel. A study is being made with a view to selecting a few enlisted men to be used as law clerks and a few to be used as court stenographers.

The statute[9] provides that

> The authorized numbers of officers in each of the several grades in the Judge Advocate's promotion list shall be prescribed by the Secretary of the Department of the Army, but the number thus authorized shall not exceed the following percentages of the total strength authorized for the list: 8 percentum in the grade of colonel; 14 percentum in the grade of lieutenant colonel; 19 percentum in the grade of major; 23 percentum in the grade of captain; and 36 percentum in the grade of first lieutenant.

The statute provides, further, that numbers may be authorized within the total authorized commissioned strength, "for any grade in lieu of authorization in higher grades."[10] In the act it is stipulated that the reorganization required by the statute "shall not operate to require a reduction in permanent grade of any officer now holding permanent appointment."[11]

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[9] 62 STAT. 643 (1948), 10 U.S.C.A. § 65 (Supp. 1948).
[10] *Ibid.*
[11] *Ibid.*

Additional judge advocate officers may be appointed in the regular Army, within the authorized strength of the Judge Advocate General's Corps (1) by transfer of qualified officers from other branches of the Army, and (2) by appointment of qualified civilian graduates of accredited law schools.[12]

Appointments may be made in the grade of first lieutenant from applicants having the following qualifications: (1) must have reached twenty-first birthday and not passed thirty-second birthday on date of appointment; provided, however, "the maximum age may be increased by the number of years, months, and days of active federal service performed after attaining the age of 21 years as a commissioned officer in the Army of the United States subsequent to 31 December 1947, but not to exceed a total of 5 years;" (2) must be a graduate of an approved law school, with a professional degree; (3) must be admitted to practice before the highest court of a state or a federal court and be in good standing before the bar; (4) must have demonstrated an aptitude for the military service by having (a) been designated a distinguished military graduate, senior division, Reserve Officers' Training Corps, or (b) served as a commissioned officer in active federal service in any of the Armed Forces of the United States for at least one year with a creditable record, or (c) completed the Judge Advocate General's qualification tour on extended active duty.

Applicants who are distinguished military graduates of Senior Reserve Officers' Training Corps units, or who have served at least a year as a commissioned officer in active federal service in any of the armed forces of the United States and who are not required to undergo the one year qualification tour, will be ordered to active duty in the Office of the Judge Advocate General for a period of 90 days for observation prior to final selection.

The Judge Advocate General's Corps qualification tour of one year is required of applicants for commission in the regular Army for all of those who do not come in the two categories eligible for the ninety days observation tour. In Special Regulations, 605-25-15, Department of the Army, dated 2 November 1949, entitled "Appointment in the Judge Advocate General's Corps, Regular Army," all of the detailed requirements are prescribed which must be met in order to qualify for appointment as a regular Army judge advocate.

Currently, the total authorized strength of regular Army judge advocates is being attained by the foregoing two methods. There is authority for 546 regular Army judge advocates. Provision has been made for the

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[12]Special Regs. 605-25-15 (Dep't Army 1949).

selection of approximately fifty officers a year in the grade of first lieutenants from recent law school graduates who compete for appointment during an observation tour.[13] Under the regular Army civil schooling program, the Judge Advocate General's Corps is authorized to select for detail a limited number of officers of other branches of the regular Army to attend accredited law schools.[14] This number recently has been eighteen a year. Upon completion of the three year course in law school and admission to the bar of the highest court of one of the states or a federal court, these officers are transferred to the Judge Advocate General's Corps. In January, 1950, there were fifty-seven of these officers enrolled in thirteen law schools.

The Judge Advocate General (a major general), the Assistant Judge Advocate General (a major general), and the three other general officers (brigadier generals) of the Judge Advocate General's Corps are appointed by the President, by and with the advice and consent of the Senate, from among officers of the Judge Advocate General's Corps who are recommended for such positions by the Secretary of the Department of the Army. The statute provides that

> Upon the appointment of an officer to be the Judge Advocate General or Assistant Judge Advocate General with the rank of major general, he shall at the same time if not then holding permanent appointment in such grade be appointed a major general in the Regular Army.[15]

The Judge Advocate General is appointed for a period of four years, after which time he usually retires from active duty in the regular Army.

As of January 1, 1950, the total number of active reserve officers of the Judge Advocate General's Corps was 3440. Of this number, 254 were in January, 1950, on extended active duty, thus making as of that date 579 Army judge advocates on active duty: 325 regular Army officers and 254 reserve officers. Reserve judge advocates rank from brigadier general to first lieutenant. Civilian lawyers are eligible to apply for a reserve commission in the Judge Advocate General's Corps under provisions laid down in paragraph 49, Department of the Army Circular 210, dated 14 July 1948, entitled "Appointment of Professional and Technical Experts or Specialists in Officers' Reserve Corps." Currently, appointments are being made only in the grade of first lieutenant, where the applicant in addition to certain other prescribed qualifications, as to age, for example,

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[13]Army and Navy Journal 335 (Nov. 26, 1949).
[14]Special Regs. 350-230-50 (Dep't Army 1949).
[15]62 Stat. 643 (1948), 10 U.S.C.A. § 61a (Supp. 1948).

must have been graduated from an approved law school with a professional degree, must have been admitted to the practice of law, and must have membership in good standing of the bar of the highest court of a state or of a federal court. Formerly the lowest grade in which a reserve judge advocate could be commissioned was that of captain, and there was a requirement that before a lawyer could be commissioned as a reserve judge advocate he must have had at least five years active experience in the practice or teaching of law or in holding judicial office. First lieutenants may now be appointed, when vacancies exist, following graduation from law school and admission to the bar. At the time when vacancies existed in the higher grades, a minimum of legal experience was required, as follows: four years for captains, nine years for majors, fourteen years for lieutenant colonels, nineteen years for colonels.

Functions and Duties

In military terms, the mission of the Judge Advocate General is to administer a system of military justice throughout the Army and to furnish general legal advice. The statute creating the new Judge Advocate General's Corps[16] provides that

> The Judge Advocate General shall, in addition to such other duties as may be prescribed by law, be the legal adviser of the Secretary of the Department of the Army and all other officers and agencies of the Department of the Army; and all members of the Judge Advocate General's Corps shall perform their duties under the direction of the Judge Advocate General.

The trial and review of cases brought before courts-martial constitute only one, though a major and highly important one, of the duties of the Judge Advocate General's Corps. The scope of the duties of the corps is indicated by the divisions which exist in the Office of the Judge Advocate General in Washington. The ten divisions are Claims and Litigation, Contracts, Lands, Military Affairs, Military Justice, New Trial, Patents, Procurement, War Crimes, Special Projects.[17] In addition to the major functions of the Office of the Judge Advocate General as prescribed in the Special Regulations of the Department of the Army dealing with the subjects of claims, contracts and real property, international law, legal assistance, preparation and interpretation of statutes, and procurement, many important administrative duties are placed by law and by Army Regulations upon the Judge Advocate General's office, to perform which duties the office supplies one or more of the Army representatives on numerous government boards and committees.[18]

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[16] 62 Stat. 643 (1948), 10 U.S.C.A. § 62a (Supp. 1948).
[17] Special Regs. 10-225-1, §§ III and IV (Dep't Army 1949).
[18] *Id.* § V.

The Judge Advocate General's Corps of the Army is one of the largest law firms in the United States or in the world. In January, 1950, the office in Washington had on duty 123 lawyers and 170 civilian employees. In addition to that number, thirty to fifty officers of the Judge Advocate General's Corps were detailed to duty with other government departments and agencies in Washington. These figures indicate that approximately one-third of the regular Army judge advocates normally are on duty in the Washington office; the other two-thirds of the total number are on duty at posts, camps, and stations throughout the United States and the world.

The administration of military justice, particularly in time of war, draws public attention to the legal branch of the Army. Following a war there is always demand for the improvement of the administration of military justice.

Title II of the Selective Service Act of 1948 amended the then existing Articles of War; provided for the expansion of the Judge Advocate General's Department; renamed the department "the corps"; and changed the status of officers of the corps.

Following the enactment of the statute and its approval on June 24, 1948, a new edition of the Manual for Courts-Martial, U. S. Army, 1949, was published. Its provisions became effective February 1, 1949. The new revision is an outgrowth of suggestions and recommendations for the improvement of the administration of military justice which followed the experiences of World War II. A new revision came after World War I, the 1920 edition of the Manual.

The Articles of War are acts of Congress. In 1950, there are 121 Articles of War. The Constitution of the United States allocates to Congress the power to make all rules for the government of land and naval forces.[19] Blackstone[20] "was of the opinion that articles of war should be promulgated by statute instead of by executive order."[21]

The first American Articles of War were adopted by the Second Continental Congress on June 30, 1775, just three days after George Washington took command of the Continental Army. Those articles strikingly resembled the British Articles then in force, which had been derived from earlier European Articles traceable back to the Middle Ages. Congress has periodically reconsidered and revised the Articles of War in

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[19]U. S. Const. Art. I, § 8.
[20]1 Bl. Comm. *416.
[21]Fratcher, *Appellate Review in Military Law,* 14 Mo. L. Rev. 15 (1949).

the light of new experience. The original 1775 Articles were revised in 1776, 1786, 1806, 1874, 1892, 1916, 1920, and 1948.[22]

In March, 1946, the Secretary of War appointed a committee of eminent lawyers and judges nominated by the President of the American Bar Association to make a study of all aspects of the administration of military justice. The chairman of this committee, known as the Advisory Committee of Military Justice, was Dean Arthur T. Vanderbilt of the New York University School of Law, now Chief Justice of the New Jersey Supreme Court.

After extensive investigation the committee submitted its report in November 1946. The committee found that

> the Army system of justice in general and as written in the books is a good one; . . . it is excellent in theory and designed to secure swift and sure justice; . . . the innocent are almost never convicted and the guilty seldom acquitted.

The committee found certain defects in the operation of the system, however, the most important of which pertained to (1) the improper influence of commanders upon courts with respect to the severity of sentences; (2) inequality of sentences; and (3) insuffiency of trained personnel to administer the system from a legal and professional standpoint.

The report of the committee contained specific recommendations for the improvement of the administration of military justice. Following the report of the Vanderbilt Committee, the Department of the Army submitted a bill to Congress making changes in its system of military justice. The identical bill was not passed, but a bill embodying most of the recommended changes was adopted.[23]

It should be realized that although in both instances the ideal of impartial justice must be constantly borne in mind, a system of courts-martial embraced in a military judicial organization must differ in some respects from a civilian court system.

Organization of Courts-Martial

A general court-martial is composed of the following: (1) the members of the court, any number not less than five, including the president and the law member; (2) the officers of the court (who are not mem-

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[22] *Ibid.* The concluding sentence reads: "Under the officers of the Judge Advocate General's Corps our military law, like the common law, will continue to be a gradually developing system, adapting itself steadily to new conditions and needs of the military service."

[23] 62 Stat. 627 (1948), 10 U.S.C.A. §§ 61, 61a, 62a, 65, 1472 *et seq.* (Supp. 1948).

bers), *i.e.*, the prosecution staff consisting of the trial judge advocate (prosecutor) and his assistants, and the defense counsel and his assistants; (3) the reporter. A defendant brought before a court-martial is called "the accused."

The president of the court is always the senior member officer of the court. He presides as administrative head of the court. The law member is now virtually a trial judge. In the event that the law member is the senior member officer of the court, he serves also as president of the court. Each member of the court has one vote. In the general run of cases, a two-thirds vote is required to sustain a conviction, the exceptions being that where the death penalty is involved a unanimous vote is required and for the penalty of more than ten years imprisonment a three-fourths vote is required.

Other officers, not members of the court-martial, but who have duties connected with a trial by general court-martial and the pre- and post-trial procedure in the administration of military justice should be mentioned:

1. The Commanding Officer Exercising General Court-Martial Jurisdiction. This officer is one having authority to appoint a general court-martial and bring to trial persons subject to military law. Article of War 8 prescribes who may appoint such courts. In general, the power to appoint general courts-martial is limited to commanders of large units. An officer who appoints a court-martial is known as the appointing or convening authority. He decides, upon advice of his staff judge advocate, whether a case is to be referred for trial by a general court-martial. He appoints the members of the court, the trial judge advocate and assistants to conduct the prosecution, and the defense counsel and assistants to represent the accused—with the provision, however, with regard to defense counsel, that the accused has a right to be represented by counsel of his own selection, military or civilian, in which case the president of the court may excuse the appointed defense counsel.

2. The Staff Judge Advocate. This officer is the legal adviser to the appointing or convening authority and has important pre- and post-trial duties in connection with every trial by general court-martial. Before directing the trial of any charge by general court-martial the convening authority must refer it to his staff judge advocate for consideration and advice. No charge is referred to a general court-martial for trial unless it has been found that a thorough and impartial investigation has been made and that such charge is legally sufficient to allege an offense under the Articles of War, and is sustained by evidence indicated in the report of investigation. The staff judge advocate makes a written and signed statement as to his findings and a signed recommendation of the action to be

taken by the appointing authority. The recommendation must accompany the charges if referred for trial.

The term "charges" or "charges and specifications" is applied to the formal written accusation against the accused. Any person subject to military law may prefer charges, and is known as the "accuser."

After trial, if sentence is adjudged, the staff judge advocate submits a written review of the record of trial to the reviewing authority, who normally is the official who appointed (convened) the court-martial which adjudged the sentence. The staff judge advocate makes recommendation for approval of the finding and the sentence by the court if it is his opinion that the accused is guilty beyond a reasonable doubt and that the record of trial has been found legally sufficient to support the sentence.

3. The Reviewing Authority. This officer is ordinarily the appointing or convening authority. However, he may be the successor in command to the appointing or convening authority; he may be the commander "for the time being" of the appointing authority's unit; and, in some cases, the commander of a different unit who has general court-martial jurisdiction in his own right.

4. The Appellate Agencies. In addition to the foregoing officers having post-trial duties in general courts-martial, there are those charged with the appellate review of all records of such trials which are forwarded to the Department of the Army. The appellate agencies may be any or a combination of the following: The Judge Advocate General, the Boards of Review, the Judicial Council, the Secretary of the Army, and, in rare cases, the President. These bodies will be identified and discussed as they are touched upon later in this article.

The organization of a special court-martial differs from that of a general court only in that fewer members are required and no law member is appointed. The president of the special court performs the duties of the law member. He does not have the authority to rule finally as does the law member, but must rule subject to objection by any other member of the court. Summary courts-martial always consist of one officer.

General courts-martial are the major criminal courts of original jurisdiction, or courts of first instance, of the system of military courts. Article of War 12 prescribes the jurisdiction of general courts-martial. They have jurisdiction to try any person subject to military law for any crime or offense made punishable by the Articles of War, and any other person who by the law of war is subject to trial by military tribunals. A general court-martial has power to adjudge any punishment authorized by law or

the custom of the service.[24] A general court-martial has jurisdiction over all capital cases, *i.e.*, those cases in which the death sentence may be awarded. Other major cases are normally tried by general courts-martial.

Special courts-martial are the intermediate criminal courts of the Army. Article of War 13 prescribes the jurisdiction of special courts-martial. They have jurisdiction to try any person subject to military law for any crime or offense not capital made punishable by the Articles of War. Although a capital case rarely is tried by a special court-martial, Article of War 13 provides

> that the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interests of the service so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses herein prescribed.

Special courts-martial may not adjudge dishonorable discharge or dismissal, or confinement in excess of six months, nor adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months. On the question of penalties, it is also provided (1) that subject to approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate review by the Judge Advocate General and appellate agencies in his office, a special court-martial may adjudge a bad-conduct discharge in addition to the other authorized punishment, and (2) that a bad-conduct discharge shall not be adjudged by a special court-martial unless a complete record of the proceedings and of the testimony taken by the court is made.

Summary courts-martial are the minor criminal courts of the Army. In cases involving ordinary types of minor delinquencies committed by servicemen, the commanding officer usually awards punishment under authority given him under the 104th Article of War. Where offenses are of a more serious nature, normally they are tried by a summary court-martial, that is, by one officer, who weighs the evidence and gives a decision.

Article of War 14 prescribes the jurisdiction of summary courts-martial. They have jurisdiction to try any person subject to military law, except an officer, a warrant officer, or a cadet, for any crime or offense not capital made punishable by the Articles of War. Non-commissioned

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[24]Concerning the jurisdiction of a military commission, see *Ex parte* Quirin, 317 U.S. 1 (1942). As to the jurisdiction of a general court-martial under the law of war, see CM 302791, 5 BULL. JAG 262; CM 318380, 6 BULL. JAG 117.

officers may not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a special court-martial. It is provided, also, that the President may by regulations except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

Summary courts-martial may not adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay.

Commenting on the work of the three types of military courts, Lieutenant Colonels Edwards and Decker in their admirable book, *The Soldier and the Law,* say in their chapter on Special Courts-Martial:[25]

> Descending the ladder of military courts from the top (general court) we come next to the intermediate court—the special court-martial. It handles cases of too serious a nature to be tried by summary court and yet not serious enough to demand the heavy penalties which may be imposed by a general court-martial. Since the Manual prescribes that a case shall be sent for trial before the lowest type of court-martial which has jurisdiction and can award adequate punishment, summary court-martial trials are usually most numerous, special courts less numerous, and general courts comparatively infrequent.

Changes in Court-Martial Procedure

Since February 1, 1949, important changes in the administration of military justice have been in effect. The more important changes will be discussed here.[26]

1. Under the old law, only commissioned officers could sit as members of a court. Now warrant officers and enlisted men are permitted to serve on courts when warrant officers and enlisted men are being tried, warrant officers when warrant officers or enlisted men are being tried and enlisted men when enlisted men are being tried. The accused enlisted man has only to request in writing at any time prior to the convening of the court to ensure that the membership of the court will include in its number enlisted persons to the number of at least one-third of the total membership of the court.[27] No enlisted person may sit as a member of a

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[25]Edwards and Decker, The Soldier and the Law 230 (5th ed. 1949).

[26]Wiener, The New Articles of War 1 (1949), calls attention to the fact that the new act amends over one-third of the existing Articles of War.

[27]41 Stat. 788 (1920), as amended, 62 Stat. 628 (1948), 10 U.S.C.A. § 1475 (Supp. 1948) (Article of War 4).

court-martial for the trial of another enlisted person who is assigned to the same company or corresponding military unit.[28]

2. Each general court-martial has a law member who is charged with the responsibility of passing on all questions as to the admissibility of evidence and on all motions involving legal questions. While the old law made the appointment of a judge advocate as law member directory, it was not a jurisdictional prerequisite. The new law changes this. It is provided that

> The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Corps or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail.[29]

It is also provided that "no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed."[30] While under the old law some rulings of the law member on legal questions were not final, now all rulings of the law member are final regardless of objections by other members of the court, except his rulings on motion for finding of not guilty or on an issue of sanity.[31] Before vote is taken on finding, the law member must now in open court instruct the court that the accused is presumed innocent until his guilt is established beyond a reasonable doubt.[32] Though this rule has been followed in the past, the new Article of War 31 for the first time definitely states this fundamental principle, and requires that the principle be stated to the court at the outset of the trial.

3. In the past the trial judge advocate (the prosecuting officer) did not need to be a lawyer, nor did the defense counsel. Article of War 11 provides that

> the trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Corps or officers who are members of the bar of

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[28] 41 STAT. 790 (1920), as amended, 62 STAT. 630 (1948), 10 U.S.C.A. § 1487 (Supp. 1948) (Article of War 16).
[29] 41 STAT. 788 (1920), as amended, 62 STAT. 628 (1948), 10 U.S.C.A. § 1479 (Supp. 1948) (Article of War 8).
[30] *Ibid.*
[31] 41 STAT. 793 (1920), as amended, 62 STAT. 631 (1948), 10 U.S.C.A. § 1502 (Supp. 1948) (Article of War 31).
[32] *Ibid.*

a Federal court or of the highest court of a State of the United States.[33]

In all cases in which a lawyer is appointed as trial judge advocate, the defense counsel must be a lawyer if the accused so demands. When the accused is represented by counsel of his own selection and does not desire the presence of the regularly appointed defense counsel, the latter may be excused by the president of the court.[34] This provision of Article 11, which gives the accused a right to be defended by a lawyer if he is prosecuted by one, corrects the evil under the old law which permitted the appointing authority to appoint a lawyer to prosecute and a non-lawyer to defend. Another change prohibits an officer who has served as investigating officer from serving as the trial judge advocate.[35]

4. There are three kinds of courts-martial: general, special, and summary. The jurisdiction of special courts-martial has been increased. Prior to February 1, 1949, an officer could be tried only by a general court-martial. Now, an officer may be tried by a special court-martial. A special court-martial is not authorized to adjudge dishonorable discharge of enlisted personnel or the dismissal of an officer, but it may under the new law adjudge a bad conduct discharge for enlisted personnel. It is required, however, that before the sentence of the special court-martial adjudging a bad conduct discharge can be ordered executed, the sentence must be approved by the officer exercising general court-martial jurisdiction for the command, and the record of trial must be held legally sufficient to support the findings of guilty and the sentence by a board of review in the Office of the Judge Advocate General.[36]

5. Commanding officers and others are now definitely prohibited from censuring, admonishing or reprimanding any member of a court or the court with respect to their judicial responsibility.[37] It is unlawful for any person subject to military law to attempt to influence a court or a reviewing or confirming authority in the discharge of their judicial acts.[38]

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[33] 41 STAT. 789 (1920), as amended, 62 STAT. 629 (1948), 10 U.S.C.A. § 1482 (Supp. 1948) (Article of War 11).

[34] *Ibid.*

[35] *Ibid.*

[36] 41 STAT. 789 (1920), as amended, 62 STAT. 630 (1948), 10 U.S.C.A. § 1484 (Supp. 1948) (Article of War 13). See 41 STAT. 789 (1920), as amended, 62 STAT. 629 (1948), 10 U.S.C.A. § 1483 (Supp. 1948) (Article of War 12), a general court-martial may impose a bad conduct discharge in lieu of dishonorable discharge.

[37] 41 STAT. 805 (1920), as amended, 62 STAT. 639 (1948), 10 U.S.C.A. § 1560 (Supp. 1948) (Article of War 88).

[38] *Ibid.*

6. In time of war, when a sentence to dismissal is adjudged in the case of an officer, the court in lieu of dismissing the officer from the service may reduce him to the grade of private.[39]

7. Under the old Article of War 104, the commanding officer could impose certain disciplinary punishments upon enlisted men of his command for minor offenses, which he may still do. The old law provided that in time of war or grave public emergency, a commanding officer of the grade of brigadier general or higher could impose upon an officer of his command below the grade of major (company grade officer, *i.e.,* lieutenants and captains, as distinguished from field grade officers, *i.e.,* from major up) a forfeiture of not more than one-half of his pay for one month. The new article changes this by (1) allowing any officer exercising general court-martial jurisdiction to impose upon a warrant officer or commissioned officer of the grade colonel to second lieutenant a forfeiture, (2) increasing from the maximum amount of forfeiture from not more than one month to not more than three months, and (3) extending the authority to apply such punishment in time of peace as well as "in time of war or other grave public emergency."[40]

8. Certain changes in pre-trial procedure are made in the new law: (1) if the accused requests counsel in connection with the formal investigation of the charges against him, counsel must be provided, and this may be "by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general courts-martial jurisdiction over the command";[41] (2) compulsory self-incrimination is prohibited; it is unlawful for anyone subject to military law to procure an admission, statement or confession by coercion or undue influence from an accused, and an accused must always be advised "that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used against him in a trial by court-martial";[42] (3) an accused awaiting trial shall not be made subject to punishment or penalties other than confinement prior to sentence;[43] (4) non-commissioned officers of the first two grades may now be tried by summary court-martial if they expressly consent.

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[39] 41 STAT. 796 (1920), as amended, 62 STAT. 633 (1948), 10 U.S.C.A. § 1515 (Supp. 1948) (Article of War 44).

[40] 41 STAT. 808 (1920), as amended, 62 STAT. 641 (1948), 10 U.S.C.A. § 1576 (Supp. 1948) (Article of War 104).

[41] 41 STAT. 796 (1920), as amended, 62 STAT. 633 (1948), 10 U.S.C.A. § 1517b (Supp. 1948) (Article of War 46).

[42] 41 STAT. 792 (1920), as amended, 62 STAT. 631 (1948), 10 U.S.C.A. § 1495 (Supp. 1948) (Article of War 24).

[43] *Supra* note 28.

9. Under the new law, the staff judge advocate of any command is specifically "authorized to communicate directly with the staff judge advocate of a superior or subordinate command, or with the Judge Advocate General."[44]

10. The new law makes some changes on the subject of punishments. Under the old law, a sentence by the court of death or life imprisonment was mandatory for a person convicted on a charge of murder or rape. On these subjects the new law provides that "any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct."[45] On the subject of rape, the act provides that "any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct."[46] No person subject to military law may be tried by court-martial for murder or rape committed within the United States in time of peace.[47] In time of peace, such cases are tried in the regular civil courts. Under the old Articles of War, dismissal from the service was mandatory for an officer convicted by a court-martial on the charge of being drunk on duty in time of war.[48] Dismissal is no longer mandatory in such cases, for the new article states that "any person subject to military law, who is found drunk on duty, shall be punished as a court-martial may direct."[49] No distinction is made between the act of drunkenness committed in time of war and in time of peace, and the punishment in either case is left to the discretion of the court, as has always been true in the case of enlisted personnel.

11. Three other procedural changes should be noted: (1) under the old law, depositions could be taken only by the defense in capital cases; now depositions may be taken by the prosecution in those capital cases where the death sentence is not mandatory if the appointing authority directs that the case be treated as a non-capital case, and depositions may be taken before the charges are preferred for trial, provided, the accused is furnished counsel;[50] (2) there is no longer a statute of limitations for the offense of absence without leave committed in time of war, and where

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[44]41 STAT. 796 (1920), as amended, 62 STAT. 634 (1948), 10 U.S.C.A. § 1518a (Supp. 1948) (Article of War 47).

[45]41 STAT. 805 (1920), as amended, 62 STAT. 640 (1948), 10 U.S.C.A. § 1564 (Supp. 1948) (Article of War 92).

[46]*Ibid.*

[47]*Ibid.*

[48]41 STAT. 804 (1920), as amended, 62 STAT. 639 (1948), 10 U.S.C.A. § 1557 (Supp. 1948) (Article of War 85).

[49]*Ibid.*

[50]See 41 STAT. 792 (1920), as amended, 62 STAT. 631 (1948), 10 U.S.C.A. § 1496 (Supp. 1948) (Article of War 25), for conditions under which depositions may be taken.

the trial of a case would be detrimental to national security, the statute of limitations may be extended by the Secretary of the Army until six months after the end of the war;[51] (3) the distinction between embezzlement and larceny has been eliminated.[52]

12. Important changes have been made affecting appellate review. Unlike the administration of justice in civil courts, in the system of military courts there is automatic appeal (always without cost to the accused) in every case where a court-martial trial results in a finding of guilty. After World War I, in an effort to meet criticism of military justice, Article of War 50½ was passed by Congress. Under that article, a new appellate review system was set up providing for a board of review in the Judge Advocate General's Office. Old Article 50½ has now been repealed, and the basic provisions have been set forth in a new Article 50. The board of review is retained.[53] In addition, there is established a new appellate body, the judicial council. A board of review must be composed of not less than three officers of the Judge Advocate General's Corps. The judicial council must be composed of three general officers of the Judge Advocate General's Corps, though the Judge Advocate General may for periods not in excess of sixty days detail as members of the judicial council officers of the Judge Advocate General's Corps of grades below that of general officer.

Wherever necessary, the Judge Advocate General may constitute two or more boards of review and judicial councils in his office, with equal powers and duties. He may also, by direction of the President, have established branch offices, including boards of review and judicial councils, with any distant command.[54]

All records of trial involving sentences of dishonorable discharge, confinement in a penitentiary, a sentence requiring approval or confirmation by the President, a bad conduct discharge, and dismissal of an officer require action by the board of review. Certain of these cases must then go to the judicial council.[55] Under the new Articles of War, all death sentences and all sentences affecting general officers require confirmation by the President.[56] Final action may be taken on all other sentences in the Office of the Judge Advocate General or one of its branches.

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[51] 41 STAT. 794 (1920), as amended, 62 STAT. 632 (1948), 10 U.S.C.A. § 1510 (Supp. 1948) (Article of War 39).
[52] 41 STAT. 805 (1920), as amended, 62 STAT. 640 (1948), 10 U.S.C.A. § 1565 (Supp. 1948) (Article of War 93).
[53] 41 STAT. 797 (1920), as amended, 62 STAT. 635 (1948), 10 U.S.C.A. § 1521 (Supp. 1948) (Article of War 50).
[54] *Ibid.*
[55] *Supra* note 21.
[56] *Supra* note 53.

The Judge Advocate General is given greater power with respect to appellate procedures,[57] assignment of judge advocate officers,[58] and remitting, mitigating, and suspending sentences[59] and granting rehearings[60] and new trials.[61] The power to mitigate or remit is exercised by the Judge Advocate General under the direction of the Secretary of the Army, provided that "no sentence approved or confirmed by the President shall be mitigated, remitted, or suspended by any authority inferior to the President."[62]

In view of the much more liberal procedural rules than exist in civilian appellate courts, it is interesting to note an unique feature of military law which embodies a distinct advantage to accused persons, as found in the amended Articles of War. On the subject of weighing evidence[63] it is provided that

> in the appellate review of records of trials by courts-martial as provided in these articles, the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controversial questions of fact.

Some other important post-trial safeguards which the Articles of War accord to accused persons, which generally are more liberal than are allowed in civilian systems of justice are (1) the Articles of War forbid the imposition of a more severe sentence upon a rehearing than that imposed at the first trial;[64] (2) the right to petition for a new trial after sentence has become final for any reason indicating that there has been a miscarriage of justice;[65] (3) a clemency program and a rehabilitation system which returns prisoners to duty or releases them as soon as it is apparent that they have been rehabilitated regardless of the length of the period of confinement; and (4) the power to mitigate the sentence after trial, by the reviewing authority or the Judge Advocate General.[66]

The success of the military appellate system is indicated by the fact that out of the large number of habeas corpus cases arising since World

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[57] *Supra* note 53.
[58] *Supra* note 53.
[59] 41 STAT. 799 (1920), as amended, 62 STAT. 638 (1948), 10 U.S.C.A. § 1523 (Supp. 1948) (Article of War 51).
[60] 41 STAT. 799 (1920), as amended, 62 STAT. 638 (1948), 10 U.S.C.A. § 1524 (Supp. 1948) (Article of War 52).
[61] 41 STAT. 800 (1920), as amended, 62 STAT. 639 (1948), 10 U.S.C.A. § 1525 (Supp. 1948) (Article of War 53).
[62] *Supra* note 59.
[63] *Supra* note 53.
[64] *Supra* note 60.
[65] *Supra* note 61.
[66] *Supra* notes 44 and 59.

War II, only one accused has been released from confinement as the result of final court action on his petition.[67]

Conclusion

Military lawyers examined for legal sufficiency records of more than 88,000 trials by general court-martial held in World War II. There has been little criticism on the basis that many innocent men were punished or guilty men denied a proper trial. The criticism generally of the system of military justice in World War II was directed toward what appeared to be unduly severe sentences, and the belief that there were gross inequalities in standards of punishment as between commands and as between officrs and enlisted men.[68]

Keeping in mind that in war the objective of an army is to win battles and that the commander who has the ultimate responsibility for the accomplishment of that mission must have ample authority, it is stated in a recent article in the *Army and Navy Journal*[69] on the army judicial system that

> the responsibility for the administration of military justice was not taken away from command in any respect. The only effect of the creation of the Corps was to establish a corps of military lawyers trained both as soldiers and as lawyers to perform the numerous legal duties which are required by law.

The changes made in the system of military justice by Congress in 1948, effective February 1, 1949, amending the previous laws on the subject, mark another step in the improvement of the administration of military justice. Already new changes are being suggested. The House of Representatives of the Congress, on May 5, 1949, passed and sent to the Senate a bill[70] providing for a "Uniform Code of Military Justice" to apply to all branches of the Department of National Defense—Army, Navy (including Marine Corps), Air Force,[71] and Coast Guard. The bill failed to pass in the Senate.[72] The proposed Uniform Code would

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[67]Anthony v. Hunter, 71 F. Supp. 823 (D. Kan. 1947).

[68]See Fratcher, *supra* note 21. See also, Holtzoff, *Administration of Justice in the United States Army*, 22 N.Y.U.L.Q. Rev. 8 (1947); and, for a brief bibliography, 48 Col. L. Rev. 219 (1948).

[69]Army and Navy Journal 335 (Nov. 26, 1949).

[70]H.R. 4080, 81st Cong., 1st Sess. (1949).

[71]See 62 Stat. 1014 (1948), 5 U.S.C.A. § 627k (Supp. 1948), the Articles of War apply to the United States Air Force as well as to the Army, though administered by the Judge Advocate General of the United States Air Force and the Judge Advocate General's Department of the Air Force.

[72]Sen. 857, 81st Cong., 1st Sess. (1949). See The Judge Advocate Journal, Bulletin 2 (June 1949).

supersede the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard.[73]

Under the new system for the administration of military justice, professionally trained lawyers, additionally trained in military law, are given increasing influence and control, and a control which it is believed is consistent with the efficient performance by the Army of its mission in peace and in war.

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[73]The Uniform Code of Military Justice was prepared by a committee appointed by Secretary of Defense James Forrestal and headed by Professor Edward M. Morgan, Jr., of Harvard Law School.

CONGRESS AND THE *CHURCH* AND *SPIEGEL* CASES

*Harold G. Wren**

The Technical Changes Act of 1949[1] has provided, in effect, for a Congressional overruling of the *Church*[2] and *Spiegel*[3] *cases*. It is the purpose of this article to examine the origins and effects of Sections 7 and 8 of the act.

The Law Prior to *CHURCH* and *SPIEGEL*

The Requirement of the Retention of a Reversionary Interest

The origin of the phrase "intended to take effect in possession or enjoyment at or after . . . death", as Mr. Justice Black points out in the *Church* case, appears to have been in the Pennsylvania inheritance tax law of 1826.[4] From the beginning, the clause, with its companion, the "contemplation of death" clause, was designed to bring inter vivos transfers which were attempted substitutes for testamentary dispositions within the scope of the tax, whether inheritance or estate tax.

The establishment of a test which would be determinative of what constituted a transfer to take effect in possession or enjoyment at or after death has been the joint work of the commissioner, the Congress, and the courts, particularly the United States Supreme Court.

In *Shukert v. Allen*,[5] the transferor made a transfer in trust in 1921, to accumulate the income until 1951, unless the last of the beneficiaries should have died more than twenty-one years before that date, and then to distribute the corpus among the issue of the transferor. In holding the transfer not to be a transfer intended to take effect in possession or enjoyment at or after death, Mr. Justice Holmes said:[6]

> The transfer was immediate and out and out, leaving no interest remaining in the testator. The trust in its terms has no reference to his death but is the same and unaffected whether he lives or dies.

Did it follow from this that the transferor must retain an interest in order for the transfer to be intended to take effect in possession or enjoyment

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[1]Pub. L. No. 378, 81st Cong., 1st Sess. (Oct. 25, 1949).
[2]Commissioner v. Church's Estate, 335 U.S. 632 (1949).
[3]Spiegel's Estate v. Commissioner, 335 U.S. 701 (1949).
[4]*Supra* note 2, at 637.
[5]273 U.S. 545 (1927).
[6]*Id.* at 547.

at or after death? Or, was the important fact in *Shukert v. Allen* the fact that there was no reference to the grantor's death, so far as the taking effect of the gift was concerned?

The decision of *Reinecke v. Northern Trust Company*[7] had the effect of placing the emphasis on the retention of an interest by the transferor as the primary operative fact, rather than the effect of the transferor's death on the gift. In that case, the decedent made five transfers in trust in 1919. In four of them, life interests in the income were created, terminable five years after the settlor's death or on the death of the respective life tenants, whichever should first happen, with remainders over. In one of them, the life interest was terminable five years after the settlor's death or on the death of the designated life beneficiary should she survive that date, with a remainder over. In holding that the transfers were not transfers intended to take effect in possession or enjoyment at or after death, Mr. Justice Stone said:[8]

> But the question much pressed upon us remains, whether, the donor having parted both with the possession and his entire beneficial interest in the property when the trust was created, the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed, and after the enactment of the statute, is included within its taxing provisions. That question, not necessarily involved, was left unanswered in *Shukert v. Allen,* 273 U.S. 545. There the gift of a remainder interest, having been made without reference to the donor's death, although it did in fact vest in possession and enjoyment after his death, was held not to be a transfer intended to take effect in possession or enjoyment at or after the donor's death, and for that reason not to be subject to the tax. But here the gift was intended to so take effect, although the transfer which effected it preceded the death of the settlor and was itself not subject to the tax unless made so by the circumstances that the possession or enjoyment passed as indicated.
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> . . . In the light of the general purpose of the statute and the language of § 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in § 402 (c) "to take effect in possession or enjoyment at or after his death," include any others than those passing from the possession, enjoyment or control of the donor at his death and

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[7]278 U.S. 339 (1929).
[8]*Id.* at 347, 348.

> so taxable as transfers at death under § 401. That doubt must be resolved in favor of the taxpayer.

In *May v. Heiner,*[9] the Court rested its decision on the rationale of the *Northern Trust* case.[10] Mrs. May had made a transfer in trust in 1917 to pay the income to the grantor's husband for life, then to the grantor for life, remainders to children. In holding that the transfer was not a transfer intended to take effect in possession or enjoyment at or after death, Mr. Justice McReynolds said:[11]

> At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event.

He pointed out that whether the grantor survived her husband or not was wholly immaterial in determining whether the transfer was intended to take effect in possession or enjoyment at or after death.

It logically followed from the rationale of *May v. Heiner* that where a transferor made a transfer, reserving a life estate in himself, such a transfer would not amount to a transfer intended to take effect in possession or enjoyment at or after death.[12] This result was overruled by the joint resolution of March 3, 1931,[13] which amended the law so as to make transfers in which the transferor retained a life interest includable in the gross estate.

Thus a new statutory concept was developed out of the idea of a transfer intended to take effect in possession or enjoyment at or after death, viz. a transfer in which the decedent had retained a life interest. It is to be noted that in overruling the result of *May v. Heiner,* Congress

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[9]281 U.S. 238 (1930).

[10]*Cf.* Commissioner v. Church's Estate, *supra* note 2, at 641, where in speaking of May v. Heiner, *supra* note 9, Mr. Justice Black says: "The Court also quoted from and relied heavily on Reinecke v. Northern Trust Co., 278 U.S. 339, ... This Court there held that the corpus of two trusts that reserved a life income to the grantor plus a power to revoke should have been included in the decedent's estate. The corpus of five other trusts were held not includable. These five trusts did not reserve a power in the grantor alone to revoke, nor did they reserve a life estate to the grantor, but they provided for accumulation of that income during the settlor's life, and at his death it was to go to the beneficiaries, subject to prior use by the beneficiaries as directed by the settlor. Thus, this case did not directly support the May v. Heiner holding."

[11]*Supra* note 9, at 243.

[12]Burnet v. Northern Trust Co., 283 U.S. 783 (1931); Morsman v. Commissioner, 283 U.S. 783 (1931); McCormick v. Burnet, 283 U.S. 784 (1931).

[13]46 STAT. 1516 (1931). The joint resolution was subsequently held inapplicable to trusts created before March 3, 1931. Hassett v. Welch, 303 U.S. 303 (1938).

did not attempt to redefine the already existing concept of a transfer intended to take effect in possession or enjoyment at or after death, so as to include the retention of a life estate, but simply set up a new statutory concept.[14] Hence, as to transfers intended to take effect in possession or enjoyment at or after death, it was still necessary that the decedent retain some interest, other than a life estate. Must there be an *express* retention of such an interest? How large a reversionary interest must he retain? These questions remained unanswered.

The Requirement that the Beneficiaries Must Survive the Transferor in Order to Take

Shukert v. Allen had established the principle that there must be some relation between the decedent's death and the taking effect of possession or enjoyment in order for a transfer to be intended to take effect in possession or enjoyment at or after death. The commissioner has not sought to tax transfers where the transfer was "immediate and out and out" and had no relation to the transferor's death. This was true, even though there was an express retention of a reversionary interest.[15]

The *Klein*[16] case established that where the interest transferred was *contingent* upon surviving the transferor, the transfer was intended to take effect in possession or enjoyment at or after death. The court said:[17]

> Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that *the death of the grantor* was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed. [Italics added.]

Despite the above language of the Court, in the *St. Louis Trust* cases[18] interests which were vested subject to being divested were held not to be within the scope of transfers intended to take effect in possession or enjoyment at or after death. In *Helvering v. Hallock*,[19] Judge Frankfurter pointed out the fallacy in this distinction:[20]

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[14]Compare this method with that used in Pub. L. No. 378, *supra* note 1, wherein a pre-existing statutory concept of a transfer intended to take effect in possession or enjoyment at or after death was simply redefined.

[15]*See, e.g.*, Francis Biddle Trust, 3 T.C. 832 (1944), *acq.* (1945).

[16]Klein v. United States, 283 U.S. 231 (1931).

[17]*Id.* at 234.

[18]Helvering v. St. Louis Union Trust Co., 296 U.S. 39 (1935); Becker v. St. Louis Union Trust Co., 296 U.S. 48 (1935).

[19]309 U.S. 106 (1939).

[20]*Id.* at 118.

> The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin. Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.

After the decision of the *Hallock* case, the commissioner was still faced with the problem of defining the test of what constituted a transfer intended to take effect in possession or enjoyment at or after death. From the cases which had been decided, it was clear that whether the interests were contingent or vested subject to being divested, the essential element which all these transfers had in common was that it was necessary for the beneficiaries to survive the grantor in order that their rights to the property transferred might become absolute. It is this requirement of suvival *of the grantor* which is the crucial test in determining whether or not the transfer had any reference to his death and was therefore a transfer to take effect in possession or enjoyment at or after death.[21]

From *Hallock* to *Spiegel*

After the decision of the *Hallock* case, conflict arose in the lower courts as to whether the retention of a reversionary interest which arose by operation of law,[22] or which was remote,[23] would satisfy the retention of an interest test.

In an effort to clear the air the Treasury Department promulgated the "Hallock Regulation."[24] In this new regulation, it was stated that a transfer was intended to take effect in possession or enjoyment at or after death if it satisfied *both* tests, viz:

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[21]While this requirement of survival of the transferor normally involves the retention of a reversionary interest, the converse is often not the case. A reversionary interest may be retained but there may be no requirement of survival of the transferor. U.S. Treas. Reg. 105, § 81.17 example (2), as amended, T.D. 5512 (1946), is illustrative of this point.

[22]Cases where transfers subject to reverter by operation of law were held not taxable are collected at 3 P-H 1950 Fed. Tax Serv. ¶ 23,598-A (1950). Cases where such transfers were held taxable are collected at 3 P-H 1950 Fed. Tax Serv. ¶ 23,596-B (1950).

[23]The cases are collected at 3 P-H 1950 Fed. Tax Serv. ¶ 23,596-A (1950).

[24]U.S. Treas. Reg. 105, § 81.17, as amended, T.D. 5512 (1946).

(1) the requirement of survival of the grantor, and

(2) the retention of some interest by the grantor (whether express or by operation of law).

The *CHURCH* and *SPIEGEL* Cases

Thus, it was the commissioner's position that whether the interest retained was express or by operation of law, or whether it was remote or substantial, was immaterial. The tax court refused to sustain him in two memorandum opinions.[25] One of these opinions was affirmed, largely because of the *Dobson* rule, in force at that time.[26] The other was reversed.[27] Thus arose the conflict whereby the *Church* and *Spiegel* cases were brought to the Supreme Court.

The sole issue before the Court was simply whether the Treasury Regulations would be upheld. Both cases were argued before the Supreme Court in the fall of 1947. No decision was rendered during that term of court. On June 22, 1948, the court ordered both cases restored to the docket and assigned for reargument. Counsel were directed in their briefs and on oral argument to discuss certain particular points.[28]

On reargument the commissioner argued for the elimination of the requirement of a retention of an interest. In the *Spiegel* decision, the court, however, failed to pass on this question, but simply proceeded on the assumption that the retention of an interest was necessary, and held that an interest which arose by operation of law was sufficient to satisfy the reversionary interest requirement.

In the *Church* case, this question became academic once the court determined to base its decision on the overruling of *May v. Heiner*. By placing its decision on this ground, the court was not required to pass on

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[25]Estate of Francois L. Church, P-H TC Mem. Dec. ¶ 45,134 (1944); Estate of Sidney M. Spiegel, P-H TC Mem. Dec. ¶ 45,075 (1945).

[26]Commissioner v. Church's Estate, 161 F.2d 11 (3d Cir. 1947).

[27]Commissioner v. Spiegel, 159 F.2d 257 (7th Cir. 1946).

[28]*E.g.*, The Court asked, in the following terms, whether the requirement of survivorship test or the retention of an interest test was applicable: "1. Assuming that, under the applicable state law, there was no possibility of reverter and no interest of any other kind retained or arising in favor of the settlor or his estate under the transfer made in trust, *inter vivos*, did Sec. 811 (c) of the Internal Revenue Code require that the value of the corpus of the trust be included in the settlor's gross estate for federal estate tax purposes; That is, did Sec. 811 (c) require the inclusion in the gross estate of the settlor of the value of the corpus of a trust, created *inter vivos*, merely because the settlor had provided in it that, upon his death, the trust should terminate and the corpus be distributed to designated beneficiaries then surviving? 2. Assuming that, under the applicable state law, there arose, by operation of law, a possible reverter in favor of the settlor's estate, did Sec. 811 (c) require that the value of the corpus, in view of the record in the case, be included in the settlor's gross estate for federal estate tax purposes?"

the question of whether there was in fact a reversionary interest under the applicable New York law.

Regulation 105, Section 81.17 has been amended to conform with the decision of the Supreme Court in the *Church* case.[29] The commissioner has announced that no amendments to the regulations were required as a result of the decision in the *Spiegel* case.[30]

The Technical Changes Act of 1949

There was a storm of protest as a result of the Supreme Court's decisions in the *Church* and *Spiegel* cases.[31] When the "Technical Changes Bill" went to the Senate, the Senate Finance Committee determined to overrule the two decisions by legislative enactment. As originally drawn, the Senate amendments[32] overruled the *Church* case by restoring the *May v. Heiner* and *Hassett v. Welch* decisions as to transfers made prior to the joint resolution of March 3, 1931, in which the decedent had retained a life estate,[33] and the *Spiegel* case, by providing that the retention of a reversionary interest alone should not make the entire property subject to the transfer includable in the decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after death.[34]

As reported from conference, and as subsequently enacted, the new act overrules the *Church* case in the following manner:

(1) Sec. 7(a), in part, amends the code so as to restate the provision whereby property subject to a transfer in which the decedent has retained a life interest is includable in his gross estate.[35]

(2) Sec. 7(b) provides, in part, that this provision shall not apply to transfers made prior to the joint resolution of

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[29]T.D. 5741 (1949).

[30]See Notice of Proposed Rule Making, 14 Fed. Reg. 1824 (1949).

[31]See, *e.g.*, Looker, *Estate Taxation of Living Trusts: The Church and Spiegel Decisions,* 49 Col. L. Rev. 437 (1949); Foosaner, *Church-Spiegel Decisions, A New Bombshell to Existing Trusts,* 5 Taxes 444 (1949).

[32]Technical Changes Bill, H.R. 5268, as originally passed by the Senate, Sept. 16, 1949; XXXVI Standard Fed. Tax Rep. No. 44, at 11 (Oct. 12, 1949).

[33]U.S. Treas. Reg. 105, § 81.17, as amended, T.D. 5512 (1946), T.D. 5741 (1949), had attempted to prevent some of the retroactive operation of the *Church* decision by providing as follows: "In the case of a decedent who died on or before January 17, 1949, the date of the decision of the United States Supreme Court in Commissioner v. Estate of Francois L. Church, 335 U.S. 632, property transferred by the decedent shall not be included in his gross estate under this section if the decedent's only right or interest in the property consisted of an estate for his life."

[34]The effect of this provision would have been nugatory since so long as *both* the survivorship and reversionary interest tests had to be satisfied, no transfer would be includable in the decedent's gross estate *solely* because of the retention of a reversionary interest.

[35]Int. Rev. Code § 811 (c)(1)(B), as amended, Pub. L. No. 378, *supra* note 1.

March 3, 1931, if the decedent died prior to January 1, 1950.[36]

(3) Sec. 8 provides for the tax free release during 1949 and 1950 of any life interest retained under a transfer made prior to the joint resolution.[37]

As for the *Spiegel* case, the new act not only overrules the holding of the Supreme Court, but changes the law as it existed immediately prior to the *Spiegel* case, as to transfers made prior to October 8, 1949. This is done by amending the code so as to provide that property subject to an inter vivos transfer conditioned on survivorship shall not be includable in the decedent's gross estate unless he retained an *express* reversionary interest having a value, immediately prior to the decedent's death, in excess of 5 per cent of the value of the property subject to the transfer.[38]

As for transfers made after October 7, 1949, the requirement of survivorship of the decedent is made the sole test of what constitutes a transfer intended to take effect in possession or enjoyment at or after death.[39] Thus the decision of the Supreme Court in *Reinecke v. Northern Trust Company*, to the effect that some interest in the property must pass from the transferor at his death in order for the transfer to constitute a transfer intended to take effect in possession or enjoyment at or after death, has been finally overruled by the action of Congress.[40]

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[36]Pub. L. No. 378, § 7(b), *supra* note 1.

[37]*Id.* § 8.

[38]INT. REV. CODE § 811 (c)(2), as amended, Pub. L. No. 378, *supra* note 1. While this section sets up a new definition of what constitutes a transfer intended to take effect in possession or enjoyment at or after death, it is clear from the conference committee report that the requirement of survivorship of the decedent is not eliminated. In this report, it is stated: "The amendments last described apply only where possession or enjoyment of the transferred interest cannot be obtained except by beneficiaries who must survive the decedent. The existing rule that a transfer of a property interest is not intended to take effect in possession or enjoyment at or after the decedent's death unless the beneficiaries must survive the decedent to obtain possession or enjoyment is not disturbed." Conference Report No. 1412 (Oct. 11, 1949), 8 U.S.C. CONG. SERV. 2981, 2984 (1949).

[39]INT. REV. CODE § 811 (c)(3)(A), as amended, Pub. L. No. 378, *supra* note 1. INT. REV. CODE § 811 (c)(3)(B), as amended, Pub. L. No. 378, *supra* note 1, provides an additional test applicable to transfers in which there are alternative contingencies whereby possession or enjoyment can be obtained only by surviving the earlier to occur of (1) the decedent's death, or (2) some other event. Property under such transfers are includable as transfers intended to take effect in possession or enjoyment at or after death if the alternative event did not in fact occur during the decedent's life.

[40]The conference report reads, in part, as follows: "Under the conference amendments, the test of whether possession or enjoyment must await the transferor's death will also apply to transfers made after October 7, 1949. The taxability of such transfers is, however, not dependent upon the retention by the transferor of an interest in the property, thus rendering inapplicable the contrary rule enunciated by the Supreme Court in Reinecke v. Northern Trust Co. (278 U.S. 339) that the property must pass from the possession or control of the transferor at his death." Conference Report No. 1412, *supra* note 38, at 2985.

Conclusion

As for transfers in which the decedent has retained a life interest, the effect of the new law is simply to prevent the retroactive operation of the *Church* decision.

As for transfers made after October 7, 1949, the new law provides a sound test of what constitutes a transfer intended to take effect in possession or enjoyment at or after death, namely, presence of the requirement of survivorship of the decedent. It should be noted, however, that the statute, by its terms, confines the terminology "intended to take effect in possession or enjoyment at or after death" to transfers conditioned on survivorship, thus eliminating the desirable flexibility necessary in order to bring other substitutes for testamentary disposition within the scope of the estate tax law.

As for transfers made prior to October 8, 1949, the new law simply modifies the retention of a reversionary interest requirement so that there must be an express retention and the value of the reversionary interest retained, immediately prior to the death of a decedent, must exceed 5 per cent of the value of the property subject to the transfer. Despite this modification of the retention of an interest test, it is clear that the requirement of survivorship of the decedent will also have to be satisfied under the new law before a transfer can be said to be a transfer intended to take effect in possession or enjoyment at or after death. Thus, the taxpayer stands to gain tremendously by this change in the code.[47] Such an alteration in the Internal Revenue Code can hardly be said to be merely "technical."

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[41]Sec. 7(c) of the new act provides for the refund or credit of any overpayment resulting from the application of subsections (a) and (b) of Section 7, despite the fact that such refund or credit would be otherwise barred "by operation of any law or rule of law", other than a previous closing agreement or compromise, provided that claim therefor is filed within one year from the date of enactment. It is interesting to note that the bill, as it originally passed the Senate, provided that such refund could be obtained "notwithstanding any other provision of law or rule of law . . . or judicial determination." Sec. 7(b) provides, in part, that interest is not allowable on any refund arising out of the application of Sec. 7(a).

SOME PRACTICAL SUGGESTIONS ABOUT PROCEDURE IN BANKRUPTCY UNDER THE CHANDLER ACT

*S. P. Clayton**

In this article I shall attempt to furnish to the bar, and especially its younger members who have not had the opportunity to even become acquainted with the Bankruptcy Act, something that will help in the procedure and practice under the amended 1938 statute, usually referred to as the Chandler Act.[1] There will be no attempt to cite authorities to any great extent, but I shall refer to the section of the act under discussion. At times I may illustrate the text by something that has occurred in my thirty years as referee.

There are two kinds of procedures and practice which will occur to the lawyer in the course of his practice in bankruptcy, and they may readily be divided as follows: Extraordinary procedure and practice in a plenary suit, and ordinary procedure and practice, in a summary proceeding.

Plenary Procedures

Plenary procedure will occur principally in proceedings by the trustee, seeking to recover (1) a preference under Section 60 of the act, (2) to set aside an alleged fraudulent conveyance under Section 67, and (3) to enforce certain rights as such trustee under Sections 70c and e. The procedure is not difficult to the attorney for the trustee in any of these cases.[2] Under the first of these, the act in Section 60b provides as follows:

> For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any state court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

An identical provision exists in Section 67e and a substantially identical provision in Section 70e (3).

Therefore, a proper plenary proceedings either in the state's circuit or chancery court, depending upon whether it is a suit for the recovery

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[1] 52 Stat. 840 (1938), 11 U.S.C.A. § 1 *et seq.* (1943). (The sections to which reference is made in this article are from the original Chandler Act and not from U.S.C.A.)

[2] By "extraordinary procedure," it is meant that the proceeding is plenary and not supplemental to bankruptcy proceedings. "Ordinary procedure" means a summary proceeding in bankruptcy, which is commenced by a motion or petition to the referee for an order, and which is interlocutory to the bankruptcy proceedings.

of money or a suit to set aside an alleged preferential conveyance, would be proper remedy, and the entire proceeding would be governed by the practice in such courts. In the event the trustee preferred a suit in the federal court, the procedure would be governed by the Federal Rules of Civil Procdure as provided by General Order in Bankruptcy Number 37 of the United States Supreme Court.[3]

If summary proceedings are indicated, then the trustee would file a petition with the referee, in the nature of a bill in equity, setting out the facts and praying relief and asking that notice to be given to all "parties in interest," which would include anyone claiming any kind of lien on the property involved. The case would then be tried before the referee, much in the same manner as a trial in chancery court, with the usual right of review to the district judge within ten days after decision.

Let me caution the attorney for the trustee, that the federal courts are inclined to look with disfavor on summary proceedings and to prefer that a plenary suit be brought either in that court or the state court. But there is no question that Section 67a (4) represents an entirely new plan for placing certain questions in the hands of the referee for speedy decision.

The procedure under Section 70 will be concerned principally with subsection c, commonly called "the strong arm clause," and also with the enforcement of Section 70e which provides in substance for the setting aside of a fraudulent transfer made or suffered or an obligation incurred by a debtor adjudged a bankrupt which, under any federal or state law applicable thereto, is fraudulent as against creditors or voidable for any other reason by any creditor of the debtor, having a claim provable under this act, and that the transfer is null and void as against the trustee of such debtor.

The procedure in each type of suit is provided in Section 70e (3) and is similar to that provided for in Sections 60 and 67 as set out above. It is to be observed, however, that there is no protection to the debtor's fradulent scheme by being more than four months or more than one year as in the other two sections, the only requirement being that the transfer is fraudulent under any applicable federal or state law. This extends the power of the trustee; the only limitation is that this scheme must be such that some creditor having a provable claim is affected, the trustee taking his place of course.

This covers, perhaps sufficiently, the extraordinary or plenary procedure under the act, and I will now pass to the ordinary or summary procedure. This is what confronts the lawyer when he takes his first steps

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[3]11 U.S.C.A. foll. § 53 (1943).

in the filing of a voluntary petition and the preparing of his schedules for the client. I will devote some time to the filing of an involuntary petition after I complete a discussion of the voluntary; 95 per cent or more of petitions are voluntary.

The Voluntary Petition

Contrary to a somewhat widely disseminated opinion, it is not necessary for a person or corporation to be insolvent in order that a voluntary petition may be filed. The language in paragraph 2 of the usual petition is, "Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy."

Let us assume that your client is in your office and, perhaps weary of the struggle, has decided to go into the court of bankruptcy, turn over his non-exempt property and, in due course, secure his discharge and start life anew. Before you begin your petition or the filling out of your schedules, your first problem is the "Statement of Affairs," which is one of the innovations made by the Chandler Act.[4] There are two forms of this statement. One is for the bankrupt engaged in business and the other for the bankrupt not engaged in business. We will assume, since you wish to be prepared for the worst, that your client is a merchant and of course engaged in business.

Your client should first go over this "Statement of Affairs" with you and give answers to all of the questions, to be the very best of his knowledge, because it will save a lot of useless questions asked him at the first meeting of creditors.

Now you are ready to begin filling out the petition. I have before me in my files a petition recently filed, and the petition and statement are most carefully prepared. I could not do better than to give you the caption thereof, omitting the formal parts and changing the name.

In the Matter of John Doe Jones	IN BANKRUPTCY
Doing Business as City Drug Company	No. ----------

It is always required, where it is an individual, to give the full name, but merchants and business men generally do not carry on business as "John Doe Jones," but usually under some trade name which should always be stated in the petition as well as in the statement of affairs. Otherwise John Doe Jones runs the risk of not getting a discharge.

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[4] 11 U.S.C.A. foll. § 53, Forms 2 and 3 (1943).

When your client signs his name, always accompany it with the trade name also, no matter how often he signs. This is applicable to the schedules as well, although it would be better to type the trade name just under where he will sign.

Schedules and Forms

You are now ready for the schedules. These schedules are not explicit enough, in my opinion, especially as to Schedule A-1, since it simply says "Taxes due to United States."[5] No provision is made for the office to which notice should be sent by the referee, and the same is true as to other taxes. I would suggest, as a matter of vital procedure to your client and of great aid to the referee, that you segregate these taxes and state in the schedule, "Collector of Internal Revenue, Jackson, Mississippi, For Income Tax for 1949," and "State Tax Commission, Jackson, Mississippi Sales Tax," etc.

Schedule A-2 is for creditors holding security. Give the name, address, amount, and date; and, if recorded, the book and page. This is very important also. Schedule A-3 for unsecured creditors should be carefully drawn especially as to the addresses of creditors. You should particularly notice the provisions of Section 7, entitled "Duties of Bankrupts."[6]

The penalty for not complying with certain of these provisions will be found under Section 17a (3), which is as follows:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.

It would be well for you to underscore "duly scheduled," because unless the provisions of Section 7, especially those of subsection a (8), are complied with, then the creditor affected has not been "duly scheduled" and a discharge will not release the bankrupt from his debt to that particular creditor. There are court rules in many districts which, among other things, require that the street address of the creditor shall be scheduled, but the rules of the Northern District of Mississippi do not require this.

In the case of *Kreitlein v. Ferger*[7] the Supreme Court held that listing a creditor by the name of the place where he lived (which was Indianap-

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[5] 11 U.S.C.A. foll. § 53, Form 1, Schedule A-1 (1943).
[6] 30 Stat. 548 (1898), as amended, 11 U.S.C.A. § 25 (Supp. 1948).
[7] 238 U.S. 21 (1915).

olis in that case) without giving his street address, is prima facie at least a sufficient compliance with the act, and that such omission does not, as a matter of law, render the discharge inoperative under Section 7 on the theory that the debt was not "duly scheduled."

This case was decided in 1915 and two justices dissented. With the vast increase in population and changes in business practices and in the rules of the Post Office Department as to delivery, it would not be wise to leave off the street address of a creditor if it was known or could be determined.

Creditors' Examination and the Hearing

The next question of summary procedure will arise in connection with the same Section 7: paragraph (1) requires that "the bankrupt shall attend at the first meeting of his creditors . . . ." This is mandatory, because, without an examination of the bankrupt either at such first meeting or another held for that express purpose, no proceeding will be entered by the referee looking toward his discharge. This is also in compliance with Section 14b which states the procedure. Under the statute prior to the Chandler Act in 1938, it was necessary for the bankrupt to file a petition for his discharge, but that is not the law now. Today after the bankrupt has been examined, whether that be at the first meeting or later, the referee sends out a notice by mail to all creditors who are scheduled, fixing a time for the filing of objections. This notice is addressed "To the creditors of the above named bankrupt and parties in interest," and fixes a time within which objections to the discharge must be filed. Under Section 58b this date must be at least 30 days from the date of notice.

A copy of this notice to creditors must also be sent to the trustee and his attorney, the United States attorney for the judicial district, and the bankrupt if his address is known and his attorney. If no objections are filed in writing within such time, then the referee issues a discharge and sends a copy to the bankrupt. The only grounds of objection to the discharge are those given in Section 14c and are seven in number.

In the event that objections are filed to the discharge of the bankrupt, the referee fixes a time and place for the hearing. Notice is given to creditors and parties in interest, and the referee hears the cause and enters an order either sustaining or disallowing the objections. From his decision either side may take a review within ten days to the district judge.

Involuntary Petitions in Bankruptcy

You are not likely to have many involuntary petitions in bankruptcy, but the procedure presents some rather difficult questions. Involuntary

cases in the Northern District of Mississippi will not represent 5 per cent of the total number of cases; yet during 1948 the two largest cases in number of creditors and amount of assets and liabilities were the result of involuntary petitions. One of them was the only case I have ever known in which the alleged bankrupt "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt," under Section 3a (6).

Section 3 sets forth the acts of bankruptcy for which a person or corporation may be proceeded against by involuntary bankruptcy process. Of course, the most common ground is Section 3a (4) where the party "made a general assignment for the benefit of his creditors." Of course under a general assignment for the benefit of creditors, the assignor, unless he is forced into bankruptcy, does not get any real relief, because, in that very proceeding in chancery court, any creditor may secure a decree against the assignor for the balance due after payment of any dividend. He can enroll it and at some future date perhaps issue a garnishment against the assignor and make him lose his job, or file a voluntary petition in bankruptcy after all.

Section 3 states fully the six grounds under which an involuntary petition in bankruptcy may be filed against an individual or a corporation. Any one of them, if sustained by proof, is sufficient to cause such an adjudication against the defendant. Let us first discuss the procedure. The form of the petition is set out as Official Bankruptcy Form Number 5 and styled "Creditors' Petition." Notice that there must be an allegation that the party against whom it is filed is not a farmer or a wage earner and owes debts to the amount of $1,000.00; that the petitioners have provable claims against him and are creditors, being as many as three in number and having claims for more than $500.00; an averment of the nature of the claims and how much each one amounts to and the total.

It should be alleged that within four months of the date of the petition, the alleged bankrupt committed an act of bankruptcy in that (for example) he "suffered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings and not having vacated or discharged such lien within thirty days from the date thereof at at least five days before the date set for any sale or other disposition of such property." It would then be better pleading to allege who obtained the lien and in what court and the amount, and that up to this date it had neither been vacated nor discharged.

When a person against whom a petition has been filed, alleging the commission of the second, third, or fifth act of bankruptcy, takes issue with and denies the allegation of his insolvency or his inability to pay debts as they mature, he must appear in court on the hearing and prior

thereto if the court orders, with his books, papers and accounts for full examination. If he does not appear with his books and submit to examination, then the burden is on him to prove solvency or ability to pay debts.[8] You will find the other pleading and process details set out in Sections 18 and 59, which are clear enough not to require additional comment.

If the younger members of the bar will allow me to make some suggestions, they would be as follows:

Purchase a separate copy of the Bankruptcy Act, which should not cost over five dollars, so that when a client comes and states to you his financial condition, you will be prepared to advise him and file whatever proceedings are necessary. I recall that a man came to me once in great distress. He wanted to give a mortgage to one of his friends who had loaned him money without security, but when they had consulted one attorney about it, he advised against giving the mortgage, because it would result certainly in an involuntary petition being filed against the debtor. I laughed heartily when he stated the case to me, and reminded the debtor that he was a farmer and, of course, immune to an involuntary petition. I think he was one of the happiest persons I ever saw.

You should also write to some stationery house and get at least one set of petitions, schedules, and statement of affairs, and study them carefully so that you will become acquainted with the requirements. You should also secure a set of involuntary petitions and have them on hand. One of my friends called me one day and asked me if I had a set of involuntary petitions. He would not even let me risk them in the mail, but drove about 75 miles to get them, then drove back home, and early the next day filed his petition. He will not be caught again in such a condition.[9]

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[8]30 STAT. 546 (1898), as amended, 11 U.S.C.A. § 21(d) (Supp. 1948).

[9]In this article I have confined myself to ordinary bankruptcy proceedings, which will be found in Sections 1 through 72 of the Bankruptcy Act. I have omitted the following sections and chapters: Section 75, usually called the Farm Debtor section (this expired by limitation of March 21, 1949, and has not been renewed); Section 77, the Railroad Reorganization Act; Sections 81, 82, and 83, Chapter IX, Composition of Certain Taxing Agencies; Chapter X, Corporate Reorganizations; Chapter XI, Arrangements; Chapter XII, Real Property Arrangements; and Chapter XIII, Wage Earner Plans. Each one of these provisions requires an entirely different procedure, and it would extend this article too much to undertake an outline of each. Moreover, a large percentage of bankruptcy proceedings involves only Chapter XI.

State Bar Section

IS THE LEGAL PROFESSION IN MISSISSIPPI KEEPING PACE WITH THE TIMES?

*Hugh N. Clayton**

When the request came to the writer to contribute an article to the *Mississippi Law Journal,* naturally, the first consideration was the topic to be studied and presented. The *Journal* states its purpose on the masthead in these words, "The *Journal* seeks to print matter of merit and interest; being desirous of offering freedom to contributors, it assumes no responsibility for the views expressed herein." It would, therefore, appear that the subject of any article should be composed of merit and interest to members of the bar. It is suspected that some articles in law journals, from time to time, deal in rather abstract principles of law or "dry subjects", and it is further suspected that members of the bar do not always read all of the articles and contributions contained in law journals. Consequently, it is proposed to discuss a subject that merits interest and should be the concern of every lawyer.

It has been the impression of the writer that for a person to be convincing in any statement, written or oral, he should discuss a matter in which he is interested and in which he believes. Otherwise, the effort will, probably, be unsuccessful and he will certainly not be convincing. The general attitude of the bench and bar in Mississippi toward changes and improvements has been a matter of grave concern to many persons in the legal profession and of the laity. It is proposed to submit to the members of the bar certain questions, which it is hoped are pertinent, as to whether or not we are keeping pace with the times, with various trends which are manifest, which affect human welfare, particularly when compared to the other professions in our state and nation. It is hoped that the comments contained herein will be taken as being written from a constructive point of view. They are not written in any critical or derogatory sense and nothing personal is intended. In the introduction of every motion picture, as displayed upon the screens of the cinema palaces, it is expressly stated that all references to persons, living or dead, are purely coincidental. Consequently, if it appears that any reference is made to any person, it is coincidental.

The Bar Generally

The question is often raised as to the attitude of the legal profession, both in the nation and particularly in the State of Mississippi, toward

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change. Criticisms, both from within and without the legal profession, are frequent and sometimes violent on this subject, with lawyers being called reactionaries, conservatives, and persons whose mental attitude is one of keeping things as they have been in times past.

The question is, are such criticisms justified as far as the lawyers of Mississippi are concerned?

The members of the legal profession provide the leadership in all types of human endeavor. Most of the presidents and most of the governors of Mississippi have been lawyers. Lawyers, to a large degree, predominate in numbers and in influence in the National Congress and in the State Legislature. In every Mississippi community, members of the bar constitute generally the leaders of the community. Luncheon clubs, fraternal organizations, veterans groups, churches, and all types of civic enterprises benefit from lawyers taking a leading part therein. Almost every young lawyer realizes that, when he opens his office, he must identify himself with a Sunday School Class in a Church, or a Boy Scout position, or some other type of community betterment organization in which he can establish contacts and make his personality and potentialities manifest. The legal profession shows zeal, enthusiasm, and a definite sense of civic and community responsibility in all of its contacts and actions outside of the profession itself. Do we manifest the same type of attitude within the profession and towards the judicial tribunals which affect the general public so vitally?

Are we lawyers so content with precedent, so satisfied with doing it the way we learned it years ago, with preserving the status quo, that we have become old-fashioned and archaic, both in our concepts and in the services offered the general public through our courts? Other professions, we must admit, have kept up with the trends of modern civilization. We have new medicines almost daily which have enabled us to live longer, to overcome physical disabilities quicker and to ease pain and suffering. Transportation has made tremendous strides and we are living in an age when one may cross the continent in ease and comfort in a few hours. Movement through the air enables one to do a day's work in Jackson and to get to other portions of the state in an hour or so. A tremendous advance has been made in the field of communication. Television, the radio, the telephone and the telegraph have given us instant contact with all portions of the globe and have brought into our homes intelligence and entertainment which some of us older members of the bar would have never thought possible twenty-five years ago. The other scientific professions, such as engineering, architecture, geology, et cetera, have made like advances with the times. We realize we are living in the atomic age.

Even in the field of social studies and social science, advancements have been made. Concepts, whether good or bad, have changed, and we

are living in a state which has been designated as primarily concerned with welfare and the security of the individual. Looking into the mirror of self-examination, has the legal profession progressed in like manner?

We find that the legal profession is having inroads made upon it by all sorts of individuals and services. We frequently claim that the banks practice law in connection with their trust departments. Insurance adjusters and certified public accountants are accused of usurping the functions of the legal profession. They exist and they are prospering. Can it be that they have come into a void created by the inactivity and the lack of vitality among the lawyers?

The story goes that a negro minister was told by the board of deacons that his services were no longer desired by the local church. He was very much astounded and inquired why. He said, "Don't I argufy and sputify?" The answer came back, "Yes, you do, but you don't show wherein." Since this effort is written for the members of the legal profession, and since we say we must always have specifics to prove our case, we hope we can show "wherein".

One illustration of the fact that the legal profession in Mississippi may not be alive to the situation may be the attitude of the lawyers in the state toward the Mississippi State Bar. It is not the Mississippi State Bar Association but it is an integrated bar, created by the act of the Legislature. All practicing lawyers of the state are, by operation of law, members of the Mississippi State Bar. Do we have a corresponding interest and sense of responsibility for the work of the State Bar among the lawyers? Some facts would indicate that we do not have this type of attitude. The lawyers of the state, generally, do not attend the annual meetings of the Mississippi State Bar. Usually, there are around two hundred and fifty to three hundred lawyers in attendance. Quite a few of the lawyers come for a social purpose and not with the purpose of getting anything from the meeting or contributing anything to it. The home section of the writer, Northeast Mississippi, is particularly distinguished by absence of the members of its bar. Upon asking a member of the bar from North Mississippi why he does not attend, frequently he states that he doesn't attend for the reason that the program of the State Bar is largely social and it serves no utilitarian purpose. Whether this is an excuse or a justification is a matter which can be left for the reader of this article. Section 8724 of the Mississippi Code of 1942 provides that: "Every lawyer in the State of Mississippi and admitted to practice in this State shall be entitled to participate in the proceedings at such meeting and to vote on all questions that may come before it."

The By-Laws of the Mississippi State Bar provide:

> The Board of Commissioners shall appoint a committee known as the Study Committee whose duty it shall be to suggest to the bar

> subjects for investigation and study looking towards the improvements of the courts, the laws, and the administration of justice, and the said committee shall receive and consider suggestions relative to this from the members of the State Bar. It shall be the duty of such committee to report their recommendations at the annual meeting of the State Bar.

Some years ago, one of the outstanding lawyers of the state was appointed as the Chairman of the Study Committee. This committee spent considerable time and energy in an effort to discharge its duty and submit a report to the State Bar. The report suggested certain changes. The report was printed in the *Mississippi Law Journal* three or four months before the annual meeting of the State Bar in order that full information might be given to the members of the bar as to the recommendations made. At the annual meeting, certain older members of the bar stated that they were opposed to certain recommendations in the report of the Study Committee and said that justice required that the opponents be given an opportunity to be heard and be given space in the *Journal* to set forth their views. In an attitude of fairness, the meeting agreed that such might be done, that the report would be continued until the next regular annual meeting, and that the opponents of the recommendation would be given an opportunity to present their reasons for their opposition in an issue of the *Journal* before the next annual meeting. The statement of the opponents of the recommendations was never placed in the *Journal,* and at the following annual meeting of the State Bar, the report was not called up, was not placed on the agenda and has not, until this day, been further considered by the Mississippi State Bar. Imagine the feeling and attitude of members of a committee who have worked hard and diligently in an effort to discharge their duties placed upon them by the President of the Mississippi State Bar and have such treatment by the lawyers of the state. The chairman of the committee wrote the writer that "I have given up all hopes that the State Bar is going to accomplish anything. So far as the old lawyers are concerned, I have lost all hope. When they failed to proceed against the lawyers who were openly flaunting the provisions of the statute with reference to the payment of dues, I gave up all hope."

It does seem to be a little unusual that the members of the bar, whose responsibility it is to function as officers of the court in the administration of justice, would openly flaunt the law and fail to pay the dues as required by the laws of the State of Mississippi, and that certain of our courts fail to enforce the statute. In other words, should the law apply to all other persons but possibly not to the members of the legal profession who do not desire to be governed by the provisions of the statute? How can this

attitude and practice among certain of our courts and members of the bar increase the legal profession in public esteem?

Have we applied ourselves in an effort to see that our judicial system has been modernized and made simple in order that it may speedily and expeditiously administer justice? With the exception of some of the metropolitan centers of the state, the circuit courts meet in the respective counties about twice a year. Procedures which permit dilatory practices exist with the result that a litigant may file his suit in court and it may be two or three years before he can get a trial. Every lawyer who reads this article can name instance after instance where delay and needless expense have been incurred due to the archaic practices and procedures permitted in our courts. The chancery practice is some better. The result has been that we may be cutting off our nose to spite our face. It is a matter of common knowledge that in certain circuit court districts in North Mississippi, due to possibly this and other reasons, the volume of the work and the length of the term has shrunk to such proportions that the courts ordinarily last two days. People who have causes of action are more disposed to compromise and settle the same, even to their detriment, when they realize that it may take them several years to get a trial, and that this delay may be expensive and raise considerable doubt as to whether or not the outcome would be successful.

In 1947, the President of the Mississippi State Bar and the Chairman of the Junior Bar appointed two Study Committees who coordinated their efforts and made a recommendation to both the State Bar and the Junior Bar that the Mississippi Supreme Court be given rule making power with certain limitations and restrictions. These two committees worked long and hard and produced a report which was adopted by both the State and Junior Bars. The members of the committee were convinced that it is the responsibility of the lawyers to assist in overhauling and modernizing the rules of procedure in the state courts. It is appropriate to quote one paragraph from the note of explanation accompanying the proposed act to be submitted to the Legislature as prepared by these two committees.

> We desire to point out that, apart from the 1924 Chancery Practice Act, there has been no substantial change in the method of trying suits in the Chancery Courts of the State for many years, and the methods pursued in the Circuit Courts in the matter of pleading, practice and procedure, are even more outmoded. It is felt that there is a real need for improvement in the trial of cases in both the Chancery and Circuit Courts, as well as County Courts, from the standpoint of assuring to litigants a more expeditious, less expensive, and more equitable system of adjudicating lawsuits. Under the present system, inexcusable delays and slowness in bringing controversies to

trial, the waste of litigant's and juror's time in attendance at courts during stages wherein preliminary matters are being settled or decided upon, the opportunities for surprise which are permitted under existing pleading and procedure and the injustices resulting therefrom, the waste of time and money in producing proof of matters about which there is no real controversy —all of these and other well known criticisms which are directed at the bench and bar, on account of the system of procedure existing in our State, constitute, in our opinion, a well deserved indictment and are a challenge to the lawyers to become more alive to their responsibility to the public for making the courts satisfactory media for the settling of disputes and controversies. In Mississippi, the overhauling and modernizing of rules of civil procedure are long overdue and we feel that it is one of the most pressing and vital problems affecting the administration of justice in our courts. It is a well known fact that most of the criticism directed at our courts is not at the decision or disposition of a particular case, or cases, but at the method, manner and means by which the court and lawyers act so slowly towards the achieving of a final disposition. Several practical consequences flow from the public attitude which is presently entertained about the courts of our State. In the first place, substantial citizens do not care to serve on juries which are kept waiting without duties to perform for an inexcusable length of time, during which the attorneys and the court are preoccupied with matters which should have been disposed of preliminarily. The slowness of our courts tends to discourage their use by parties who would like to submit an issue quickly and easily to an impartial tribunal. Then too, lawyers themselves, under their present rules of procedure and pleading, often are in the position of not knowing in advance what are the really controlling issues of fact and, thus being deprived of such knowledge, may not be able to present their cases in the manner consistent with the highest and best professional skill which is owing to the client. It is our opinion that the public and litigants do not desire that courts be a forum in which technicalities, surprise, and procedural cleverness carry a premium, while the substantial justice of the case may go unnoticed and disregarded. The aim of procedural pleading and practice is to provide a just way in which justice is to be secured. If this be so, there can be no condonation or defense of ancient and outmoded rules of pleading, practice and procedure which serve to deter rather than to promote the ends of justice.[1]

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[1]Report of Committee on Procedural Reform Studies, Mississippi State Bar, 18 MISS. L.J. 511, 512-3 (1947).

The so-called rule making authority recommendation was presented to the 1948 session of the Mississippi Legislature but did not pass. It did not disturb any of the prerogatives of the Mississippi Legislature and gave it a veto power or the right to amend any proposed rule promulgated by the supreme court. The influence of the Mississippi State Bar and the Junior Bar was not sufficient with the Legislature to secure the enactment of this legislation. In lieu thereof, two bills were passed, both of a piecemeal nature, which are steps in the right direction toward the modernization of our courts.

The point attempted to be made is that the Mississippi State Bar and the Junior Bar, without the whole-hearted support and participation of the members of the bar, was not able to secure passage of this act which both bars deemed advantageous to the state as a whole, and two crumbs were secured instead of the whole loaf. Does this record indicate that the lawyers of the state have the proper attitude toward the Mississippi State Bar? If personnel who have constituted the leadership of the Mississippi State Bar are not discharging their duties properly, is it not the responsibility of the members of the legal profession in the state to do something about it?

Section 171 of the Mississippi Constitution establishes the justice of the peace court. Prior to World War II, the Junior Bar was conscious of the fact that the occasion for the justice of the peace court no longer existed. It attempted to promote legislation which would establish, in lieu of this court, a county district court where several counties would participate, and which would set up a tribunal somewhat similar to the county court which is existent in some of the counties in the state. A complete lack of concern was encountered on the part of the lawyers and the laity and nothing was accomplished. Consequently, the justice of the peace continues to operate. He is usually a layman with little formal education and no legal education; he presides over legal disputes between lawyers, passes upon technical legal propositions, and has the right to determine property rights and deprive persons of their liberty, and levy fines. We do not see a comparable situation in any other profession, where a layman occupies a responsible position affecting the public with no training whatsoever for the position. Can we, as lawyers, justify the existence of the justice of the peace court in these modern times? Consider how ridiculous it would be (and it is) for Lawyer A and Lawyer B to discuss a demurrer to a criminal affidavit or a plea of the statute of limitations in a civil action before a justice of the peace, citing various decisions to sustain their respective positions. How can anyone expect the justice, no matter how honest and how sincere he is, to be competent to pass upon such a dispute. Would any lawyer feel that he would be qualified as a justice of the medicine, to pass upon an argument between

two physicians on whether surgery or internal medicine should be used to cure the patient?

Do we face a general apathy among members of the bar with regard to raising the educational standards for admission to the bar? Like Mark Twain's remark about the weather, "We all talk about it but nobody does anything about it," there is perennial conversation about it but nothing particularly happens. Every time the question is raised, the Abraham Lincoln theory of permitting the farmer boy to study in front of the fire light is advanced. Times have changed. It would appear that it is time for the legal profession to realize this. In place of the farmer boy studying in front of the fire light in the one room cabin, we have throughout Mississippi modern schools, with excellent bus transportation, electric lights, and, for the most part, good roads. Educational opportunities are available now that were never dreamed of in Lincoln's day. Junior colleges dot the state in every section, and senior colleges are located strategically all over the state. Is it possible that enough interest will be aroused among the members of the bench and bar to do something about this proposition?

The Bench

Frequently we hear the question raised, does our appellate court move with the times, or is it largely instrumental in maintaining the status quo. Blackstone has said:

> And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law.

It is recognized that

> Where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed, in similar cases or, as otherwise expressed, the principle so settled forms a precedent for the guidance for the courts in similar cases. Under this rule, courts are bound to follow the common law as it has been judicially declared in previously adjudicated cases and the rules of substantive law should be reasonably interpreted and administered.
>
> It is a salutary rule, entitled to great weight, and ordinarily should be strictly adhered to by the courts, especially where a different ruling would work injustice to some of the litigants. The courts are slow to interfere with the principle announced by the decision, and it may be upheld, even though they would decide otherwise were the question a new one, or equitable con-

siderations might suggest a different result, and although it has been erroneously applied in a particular case.[2]

However, with like effect

> The rule of stare decisis is not so imperative or so inflexible as to preclude a departure therefrom in any case, but its application must be determined in each case by the discretion of the court, and previous decision should not be followed to the extent that error may be perpetuated and grievous wrong be the result. Accordingly, unless a doctrine or principle has become so well established that it may fairly have been considered to become a rule of property, the courts will not adhere to it, although established by previous decisions, if they are convinced that it is erroneous, even though it may have been reasserted and acquiesced in for a number of years, especially if the former decisions are injurious or unjust in their operation.[3]

The Supreme Court of Mississippi, in the case of *New York Life Insurance Company v. Nessossis,* recognizes the fact that property rights as announced in previous decisions and a precedent established with reference to them should not be lightly overruled, saying,

> We called attention to the consideration that decisions on such a question should not be overruled because of the thousands of insurance policies written in this state since the publication of the decision; for in such a situation it is the settled rule that prior decisions will not be overruled unless manifestly and undoubtedly wrong, and mischievious in operation and effect. All that we are called on to say now as to the questioned decisions may be summarized by stating, as we do, that in our judgment they are neither manifestly or undoubtedly wrong nor are they mischievious in operation or effect.[4]

The duty, responsibility and right of the supreme court to overrule a previous decision or precedent is clearly recognized in *Chenault v. State* in which it is stated, "All the judges of this court are bound by the decision of the case, which then becomes the law of the state, subject to the right, whenever a majority of the court reaches a conclusion that the case should be overruled, to change such decision."[5]

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[2] 21 C.J.S. § 187.
[3] 21 C.J.S. § 193.
[4] 189 Miss. 414, 196 So. 766 (1940).
[5] 154 Miss. 21, 122 So. 98 (1929).

May it not then be said that generally in the field of human rights and possibly ex delicto causes of action, but within the stated limitations with regard to property rights, the rule as laid down by Blackstone that "the law is the perfection of reason, that it always intends to conform thereto and that what is not reason is not law" should be the rule and guide of the appellate court. It is recognized that the old maid knows how to rear the child, and that every attorney unsuccessful in a particular appeal is quite satisfied that the court reached the wrong decision. This reaction of the losing lawyer is recognized in the fact that the court has seen fit, based upon experience, to say that it is the function of the suggestion of error to furnish light and not heat. Heat would naturally be supplied from the individual who felt that the authorities in his brief had not been given the proper consideration.

Recognizing these frailities of the human personality as evidenced in the advocate, however, can it be said, within the limitations set forth above, that the rule of reason should be sufficient to overturn a precedent which is not supported by sound logic?

Dealing in specifics again, many members of the bar have, from time to time, raised the question before the appellate court as to the injustice of the state in a criminal prosecution securing the manslaughter instruction where a man is being tried on an indictment for murder.

A recent illustration of this continuing assault upon the court by the practicing attorney is the case of *Lowry v. State*.[6] Able counsel for the appellant in that case has made available to the writer the brief submitted, on which he was complimented by the court in its decision. The issue in the case was the identity of the slayer, and the position taken by the appellant was that he was guilty of murder or nothing. Appellant states in his brief:

> Certainly no element of manslaughter was shown by the evidence. If the state's evidence is to believed the defendant is guilty of murder, wanton and cold-blooded, and not manslaughter. Under that evidence the defendant brutally shot down the deceased, who had done absolutely nothing to him, who had not even spoken to him, whom he did not know and who was fleeing from him. The evidence as a whole is bound to have cast a doubt in the minds of the jury as to who fired the fatal shot yet someone must suffer punishment for this dastardly crime. Still the jury refused to find the defendant guilty of murder and was induced by the manslaughter charge to compromise. . . . In this contention we

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[6]202 Miss. 411, 32 So.2d 197 (1947).

> realize that we run counter to a number of decisions of this court and we most respectfully propose to show that the 'can't complain' doctrine has been misconstrued in those cases.

The position of the appellant was summarized by the attorney general in his brief as "although counsel for appellant admits this rule to have been firmly established in Mississippi, he advances that this rule is only applicable where the actual killing is admitted by the defendant and that it is not applicable where the defendant denies the killing."

The court commented that the appellant cited twenty-one cases wherein the manslaughter instruction granted the state had been approved where the evidence disclosed no evidence of manslaughter, but did sustain the charge of murder. That of these, eleven of them were killings admitted by the defendants, whose defenses were justification, self defense, accident or insanity. In four of them the opinions of the court do not reveal the defenses interposed, and in the remaining six cases the defendant denied doing the killing as here. The court refused to agree with the appellant, saying:

> As conceded by counsel for appellant in his brief, the state's evidence amply sustained the charge of murder. It contains no elements of manslaughter. This, it is contended, made the granting of the instructions on manslaughter a reversible error, since the appellant denied that he did the slaying of the deceased. However, since we have in twenty-one cases listed in the brief, decided definitely and positively to the contrary where the defense was justification, self defense, accident, alibi, insanity, or denial of the actual killing, in order to approve this assignment of error, we would have to overrule the six cases which reject the argument made here on behalf of the appellant and announce a different rule, as an exception to the general rule by holding that granting of a manslaughter charge to the State on an indictment for murder, sustained by the state's proof, and the evidence disclosed no elements of manslaughter, would be prejudicial error where the defendant denied that he did the killing. We cannot agree that we should do so.[7]

If the rule of sound reason is to be the rule and guide of decisions, within the stated limitations, it is submitted that this is a specific illustration of a line of decisions which overlooks the human frailty of jurors who, in their desire to render sincere and honest performance of duty, feel they must render some kind of a verdict and thereby compromise.

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[7]202 Miss. 411, 417, 32 So.2d 197, 199 (1947).

The fact that once or twice each year the supreme court has this proposition argued again would illustrate the fact that the members of the bar generally believe that the manslaughter instruction, in such cases, is merely a compromise street on which the minds of the twelve jurors may meet. Experience probably indicates that there are persons who have served in the state penitentiary by virtue of this rule who would never have been convicted of murder. Possibly, innocent persons have been compromised into the penitentiary.

All human experience teaches that where several people have to reach a decision relative to a matter and an issue is clearly drawn, ordinarily a compromise is the only method of reaching unanimous agreement. The Congress of the United States and the Legislature of the State of Mississippi illustrate this principle in conferences between the Senate and House committees. Each individual thinks differently, his impressions are different, his background is different, his educational and cultural experiences are different, and different decisions are frequently reached by twelve men sitting in the jury box. How can it be said that the manslaughter instruction, in a case where it is either murder or nothing, has any purpose but to provide an easy means by which the minds of the twelve jurors may reach a compromise and they may be discharged, in order to hurry back to their business pursuits. The frequency with which this point is raised in the supreme court is an indication that the lawyers of the state are of the opinion that the rule is not justified by sound reasoning. It may be that the impressions and ideas advanced by the writer on this point are not sound. However, the foregoing is used as a specific example of a possible illustration of the fact that the attitude of lawyers does not move with the times and with the rule of sound reasoning.

In a recent case a statement is made which may perhaps illustrate the point I am attempting to make. There was some discussion of whether a plaintiff who had sustained personal injuries may recover as an element of damages for a disfigurement of his person. The court stated,

> It was error for the trial court to have permitted the introduction of the photograph of the plaintiff in the instant case which was taken about five years prior to the accident, although the writer of this opinion and other members of the court are unable to see why such a rule should have ever become announced as to the elements of damage to be assessed in a personal injury case, it often being true that disfigurement of the person, and especially the mutilation of one's face, is the only permanent impairment and serious injury suffered by a plaintiff after his physical pain and suffering following an accident is at an end. However, we are bound by the rule as long as it may continue

to be supported by the prior decisions of this and other courts, without regard to whether or not it be supported by any good reason.[8]

If this is the true rule as announced by our court, have we become decision bound?

Conclusions

The comments, illustrations and examples cited above are presented for what they are worth. Do they indicate an attitude which should be corrected in the bench and bar of Mississippi? Are we progressing with the times or have we become weighted down by tradition, custom and an inertia? Holy Writ informs us that by their works, ye shall know them. Do the results in Mississippi gratify the brethren at the bar? Are we awake to the opportunities that lie in front of us? Will we continue to so act that additional inroads will be made upon the practice of the law? Will we do more than give lip-service to progressive change? These questions are propounded in all sincerity and seriousness. The answer will be found in the future attitudes and actions of the lawyers of Mississippi.

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[8]Koestler v. Burton, 41 So.2d 362, 365 (Miss. 1949).

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NOTES

SITUATIONS AFFECTING THE VALIDITY OF THE LANDLORD'S AGRICULTURAL LIEN

Although the statute providing for the landlord's lien on agricultural products of the leased premises expressly states that it is "paramount to all other liens, claims, or demands upon such products,"[1] certain factual situations have arisen in which the courts have held the landlord's rights inferior to those of others. It is with the variations in these factual situations that this paper is concerned.

Express Waiver

Probably the most obvious method by which the landlord may be deprived of the benefits of the agricultural lien is by his execution of an express waiver. The waiver is usually in the form of a unilateral offer in favor of another person who undertakes to make advances to the tenant in money or supplies, such advances being necessary to the completion of the crop. When the waiver is acted upon, and subsequent litigation arises, the courts usually subject it to the same scrutiny as other contracts.[2]

The restrictive aspect of a waiver is shown in the case of *Pitts v. Baskin*[3] where the landlord's agent, in assisting the tenant in obtaining a loan on his crop, signed a waiver in favor of the Bank of Indianola on the deed of trust of the tenant on his crop. When the crop was picked and ginned, it was sold by the tenant to local buyers. The tenant did not pay the rent. The landlord sued both him and the buyers for the amount of the rent claim. The buyers demurred, standing on the waiver of the landlord of the rent lien in favor of the bank. The court, in overruling the demurrer stated that the waiver conferred no right to purchase the cotton on the bank, and certainly could not be extended to vest a stranger to the trust deed with such a privilege. The waiver in this case, said the court, operated only to defer payment of the rent until the notes described in the deed of trust had been paid.

After the landlord has waived his lien in favor of a furnisher, however, his own conduct must conform to its terms, and he may not assert his position as landlord to the detriment of the furnisher. If he sells cotton subject to a deed of trust after waiving his lien, and after deducting the amount of his claim against the tenant for rent and advances, turns the balance over to the tenant, who defaults in payment of the account secured

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[1] Miss. Code § 908 (1942).
[2] Dreyfuss v. Gage, 84 Miss. 219, 36 So. 248 (1904).
[3] 140 Miss. 443, 106 So. 10 (1925).

by the trust deed, he is liable to the beneficiary for conversion.[4] Where the landlord has expressly waived his lien in favor of a furnisher, and later voluntarily commingles the cotton produced by the tenant with his own, he is then estopped to deny that the specific cotton levied on by the furnisher is not the property of the tenant.[5]

In *Newman v. Delta Grocery and Cotton Company,*[6] after execution of a mortgage on the crop, the tenant subleased part of his farm and transferred the rent notes of the sublessee to the landlord who had waived his lien in favor of the mortgagee. The court said that equity would impress an assignment on the rent notes so transferred, although other property covered by the mortgage had to be first exhausted before resort could be had to the rent notes of the sublessee.

Implied Waiver

Since an innocent purchaser of cotton or other agricultural products subject to the landlord's rent lien has no defense in lack of notice,[7] and because of similar hardships caused by strict adherence to the words of the statute, there has evolved a judicial concept of implied waiver of the lien.

In *Gaines v. Keeton,*[8] the landlord's agent sold implements to a tenant and secured both the indebtedness and the account for supplies by a deed of trust with the agent as beneficiary. The deed of trust was secured by the crop and goods and chattels of the tenant. Upon default in payment of the obligation, the landlord sold the property conveyed by the trust deed and sought to recover the balance of the claim from a merchant who had bought cotton raised on the premises by the subtenants.[9] The court, however, said that where the landlord had taken additional security his recovery was limited to the terms of that security (here, to the goods and crop of the tenant only), since the tenant could not, by his deed of trust, bind his subtenants' crops.

An extension of time by the landlord in payment of a supply account may operate as an implied waiver. In *Lumbley v. Gilruth,*[10] the landlord advanced corn to his tenant with the understanding that he would pay the landlord a stipulated amount at the end of the crop year or make a repayment in kind. At the end of the year, however, the tenant was able to do

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[4]Evans v. Carpenter, 115 Miss. 572, 76 So. 550 (1917).
[5]Alexander v. Ziegler, 84 Miss. 560, 35 So. 536 (1904).
[6]138 Miss. 683, 103 So. 373, *suggestion of error overruled,* 104 So. 157 (1925).
[7]Eason, Watkins & Co. v. Johnson, 69 Miss. 371, 12 So. 446 (1891).
[8]68 Miss. 473, 10 So. 71 (1891).
[9]Applewhite v. Nelms, 71 Miss. 482, 14 So. 443 (1894). Liability of subtenant is that of surety of the tenant.
[10]65 Miss. 23, 3 So. 77 (1887).

neither, so the landlord extended the time for payment another year. On the second year, however, the tenant gave a deed of trust on his crop to a furnisher. When the tenant was unable to pay both the beneficiary and the landlord, the landlord included the value of the corn in his claim. This the court refused to allow, going further than implying a waiver by stating that he had not even made an advance to the tenant, since the mere forbearance to compel payment for a year was not an advance to the tenant which would prejudice the rights of the beneficiary under the deed of trust.

Tenant as Agent

Where it is found that the landlord constituted the tenant his agent either in fact or merely by allowing the tenant to retain control of the crops until sale, it is usually held that the landlord has waived his lien by implication. In *Phillips v. Thomas,*[11] the landlord for three years preceding the year in question had allowed the tenant to dispose of the crop and remit the cash rent to him. In the fourth year, however, the tenant sold the cotton and abandoned the premises with the proceeds of the sale. The court found that where the landlord had allowed the tenant to dispose of the crop for a number of years, he had constituted him his agent, and if the agent failed to remit the proceeds of the sale to him, then the vendee could not be held liable for the amount due the principal as landlord.

And in *Seavey v. Godbold,*[12] by the landlord's own testimony, he had met the tenants in town and specifically authorized them to carry samples of their cotton to local merchants and sell it to them. After default by the tenants and on suit to recover from the buyers, it was held that he had constituted them his agents for the sale of the specific cotton which was actually sold, and recovery against the buyers was denied.

Out of State Shipment

Where there is an out of state furnisher who makes advances of money and supplies to the tenant, and the tenant ships the cotton to him, then the lien does not follow the cotton out of the state.[13] This is true although the non-resident purchaser has notice of the claim for rent. And if the non-resident merchant who receives and sells the cotton voluntarily pays the landlord the amount of rent due by the tenant he may not—in

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[11]128 Miss. 729, 91 So. 420 (1922). Same result reached in Judd v. Delta Grocery and Cotton Co., 133 Miss. 866, 98 So. 243 (1923), where tenant was also landlord's son.

[12]99 Miss. 113, 54 So. 838 (1911).

[13]Millsaps v. Tate, 75 Miss. 150, 21 So. 663 (1894); Ball v. Sledge, 82 Miss. 747, 35 So. 447 (1903); Chism v. Thompson, 73 Miss. 410, 19 So. 210 (1896).

absence of an express assignment of the rent claim by the landlord—assert the lien against the tenant.[14]

From this it would seem that once the agricultural products have crossed the state line the lien is lost for all purposes. But where a resident factor is an "active agent" in attaining defeat of a landlord's lien by facilitating an out of state shipment, then he is liable to the landlord for conversion.[15]

Waiver in Favor of Other Lienors

Where the landlord, by the terms of the lease agreement, imposed on the tenant the duty of delivering rent cotton ginned, and where the landlord had no gin, the court has said that the landlord consented by implication to the ginning with the resulting charge a lien[16] on the cotton. This result was reached because of the necessity of ginning of cotton prior to marketing, and hence such ginning was for the mutual benefit of landlord and tenant.[17]

Patterson v. Jones-Wilson Mercantile Company[18] is a rather curious decision—if short. In that case the ginner had been ginning the cotton of the tenant for several years and had been paid by the tenant. In the year in question, however, the tenant did not pay the ginner, but the ginner sent the cotton to the landlord's agent in Jackson, and later sent a statement of the ginner's charges to the landlord. On refusal of payment, the ginner sued the landlord, asserting that the landlord had waived her lien, citing *Duncan v. Jayne*.[19] The court said that if the landlord did waive her lien according to the rule in that case, then the ginner had also waived his by shipping the cotton to the owner prior to payment or notice of charges. The dissent objected to the majority opinion where it said that the liens were made to "neutralize one another."

The Uniform Negotiable Warehouse Receipts Act

The statutory rights afforded purchasers under the Negotiable Warehouse Receipts Act[20] impose other conditions of diligence on the landlord,

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[14]Ball v. Sledge, *supra* note 13. But an assignment of rent note has been held to carry with it an assignment of the lien. Newman v. Bank of Greenville, 66 Miss. 323, 5 So. 753 (1888).

[15]Peets and Norman Co. v. Baker, 95 Miss. 576, 48 So. 898 (1909).

[16]Miss. Code § 336 (1942); ginner's (employee's) lien held coextensive and reciprocal with landlord's. Powell v. Smith, 74 Miss. 142, 20 So. 872 (1896).

[17]Duncan v. Jayne, 76 Miss 133, 23 So. 392 (1898).

[18]117 Miss 355, 78 So. 294 (1918).

[19]*Supra* note 17.

[20]Miss. Code § 5012 *et seq.* (1942).

since the prime purpose of the Warehouse Receipts Act is to protect honest purchasers in good faith.[21]

In *McGee v. Carver*,[22] where a landlord allowed the tenant to store his cotton in a warehouse and take negotiable receipts therefor, then he could not assert his lien against a bona fide purchaser of the receipt after negotiation thereof by a transferee of the tenant (there was a conflict of evidence as to whether the transferee was authorized to indorse the receipt, but Section 47 of the act specifically provides that breach of duty by the person making the negotiation shall not impair the validity of the negotiation in case the ultimate holder was a bona fide purchaser without notice). The court cited *Commerce National Bank v. Canal Bank*[23] with approval, saying that where the landlord consented to the tenant's storage of the cotton and the taking of negotiable warehouse receipts therefor, he vested him with apparent ownership of the cotton, and having permitted the tenant to be clothed with this indicia of ownership, he is precluded by the statute from asserting a lien on the cotton as against a bona fide purchaser.

But where the landlord is able to establish that he never assented to the storage of the cotton in a warehouse, the courts will usually find that the facts do not indicate a waiver of the lien, nor such conduct as would preclude recovery of the cotton by a landlord-mortgagee.[24]

In *Tennessee Joint Stock Land Bank v. Bank of Greenwood*,[25] it was held that even if the landlord's limited agent knew of such storage prior to the time the rent was actually due, there would be no implied waiver as to such part of the claim not excluded by express waiver. Here the agent had no authority to consent to the storage of the cotton and the taking of warehouse receipts for it, nor was there a duty on the landlord to suspect his tenant of dishonest conduct, if he had done nothing to clothe him with indicia of ownership.

From the decision of *Phillips v. Box*,[26] it appears that the lien of an absent landlord will prevail if he has done nothing to clothe the tenant with indicia of ownership by consenting to storage of the cotton and sale of the warehouse receipts of it. Here, the tenant in prior years had paid in cash early in the crop year, and in the year in question the tenant's wife assured

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[21]Weil Bros. v. Keenan, 180 Miss. 697, 178 So. 90 (1938). The question of good faith had been repeatedly held not to affect landlord's lien prior to enactment of the Warehouse Receipts Act in 1920, *supra* note 7.

[22]141 Miss. 463, 106 So. 760 (1926).

[23]235 U.S. 520 (1916).

[24]Schmitt v. Fed. Compress Warehouse Co., 169 Miss. 589, 153 So. 815 (1934); Marine Bank & Trust Co. v. Greenville Savings Bank, 133 Miss. 91, 97 So. 526 (1923); Campbell v. Farmer's Bank, 127 Miss. 668, 90 So. 436 (1922).

[25]179 Miss. 534, 172 So. 323 (1937).

[26]204 Miss. 231, 37 So.2d 266 (1948).

the landlord on a periodic visit that the rent would be paid and that everything was progressing satisfactorily. The landlord, however, on the last of these periodic visits found the premises abandoned and all agricultural products removed. He searched diligently for the tenants and the cotton. He visited the tenants in Alabama and received some farm machinery which he applied on the rent claim. The tenant refused to sign promissory notes for the balance, however. On these facts, the court held that the landlord (who subsequently discovered the cotton stored in a warehouse some distance from the leased premises) had done nothing to show an agreement that the tenants might deal with the cotton as if it were free from the lien, nor in any way to waive it in favor of a bona fide purchaser of negotiable warehouse receipts for the cotton.

Conclusion

Judicial construction, the doctrine of implied waiver of the lien, and the passage of the Uniform Negotiable Warehouse Receipts Act have all contributed to imposing a duty on the landlord of almost constant control and supervision of picking, processing, storing and disposing by sale of his tenant's crop, if he is to keep his lien for rent. None of these duties are imposed by the statute creating the lien. There is almost a direct conflict of statutory rights between the landlord and the bona fide purchaser of warehouse receipts. The turning point in the cases involving this conflict seems to be the conduct of the landlord prior to the date the rent is due, or immediately thereafter, and usually with no notice that there will be a substantial adverse claim. It is submitted that this is a poor criterion.

Elwyn Darden

LEGISLATION

CONSTITUTIONAL LIMITATIONS ON THE LEGISLATURE'S POWER TO DISPOSE OF STATE LANDS

The Statute

Chapter 491 of the Mississippi Laws of 1948 provides as follows:

> *Presumption of Lost Grant as to Lands Sold to State.* Whenever there has been a sale of land for delinquent taxes to the state, which sale has been certified to the state land commissioner for more than twenty-five years, and there is no record in the land commissioner's office of said lands having been patented to anyone, there shall arise a conclusive presumption that said land has been duly patented to the person having title to said lands at the time of the sale to the state or his grantee, heir, or devisee, and the land commissioner with the consent of the attorney general, upon application of anyone claiming title to said land and upon his furnishing proof that the taxes have been paid on the land for the past ten years to the state, is hereby authorized to strike said sale, which striking shall be a disclaimer of all right, title or interest which the state of Mississippi has in such lands.

Background and Apparent Purposes of the Act

There is much land in Mississippi which was conveyed and certified to the state as tax-forfeited land prior to 1924, and to which the state still claims record title. In some instances someone is paying taxes on such property. As an illustration of this fact, the writer selected the state land commissoner's book on one county, Clarke, and noted the first tract of land which had been on the books longer than 25 years. This tract had been sold to the state for taxes around the turn of the century and there was no record of a grant out of the state to anyone. The tax records disclosed that three persons were paying taxes on separate tracts of this fractional quarter section.

Several alternative inferences may be drawn from such a typical situation. The tax sale may have been void and the owner just stayed in possession; or the owner may not have known about the sale; or there may be an adverse claimant. Also, there may have been a grant by the state to someone which was mistakenly never placed on the records.

This statute seems, in theory at least, to be a recognition by the state that oftentimes this mistake is made, and that the state should not continue to claim adverse to the true titleholder. Moreover, it has been the purpose and policy of the legislature not to force its citizens to bring suits in regard to lands erroneously or improperly sold to the state. This is evidenced by the enactment of several statutes, all of which provide for the striking from the records of void tax sales.[1] The land commissioner is empowered to strike the sales from his books upon the opinion of the attorney general that such sales were invalid. The striking of the sale is a disclaimer of title. This effective procedure for removing clouds on many titles was passed by the legislature as early as 1892,[2] but was not contested until 1949 when

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[1]Miss. Code §§ 4073, 4135, 4144, 4145, and 4077 (1942).
[2]Miss. Code §§ 4135 and 4144 (1942).

the Mississippi Supreme Court approved such method in *State v. Southern Pine Company.*[3]

Chapter 491 may seem to be a step further in this direction. However, several important distinctions place this statute in a different position from those mentioned.[4] It does not involve or consider the validity of the tax sale, the state's tax lien is not retained, and no administrative discretion is vested in the attorney general.[5] If ten years' tax receipts are filed with the attorney general, along with an affidavit that the petitioner claims under the owner at the time of the tax sale, and a certificate from the land commissioner that the land has been certified to the state for 25 years, the tax sale must be struck from the records.

The state will be able to dispose of land under this statute which, apparently, it would be unable to sell. This may have been the motivating force behind this legislation, although not found in the wording of the statute. Anyone eligible cannot afford to pass up this opportunity to regain his lost title.

This statute is a novel piece of legislation. Its background is a unique doctrine which had its beginning as a tool used by the courts to fill in gaps in a chain of title.[6] They developed the "lost grant presumption" as it is known today. The leading Mississippi case, *Caruth v. Gillespie,*[7] stated the doctrine in this manner:

> A grant may be presumed from long, peaceable possession of real property, accompanied by the usual acts of ownership, even against the sovereign; such presumption existing independently of the statute of limitations.

In part this doctrine is merely a fiction to get around the state's immunity to the statute of limitations. However, in addition to the fact that this rule had its beginning at a time when statutes of limitations ran against the state,[8] the cases show other reasonable bases for presuming the lost grants. This is discussed more fully in the following section with a comparison of the statute and the common-law doctrine.

Constitutional Problems

A distinction should be made between the factual basis of the lost grant presumption arising when taxes were paid by a former landowner before the passage of Chapter 491 and after that date. A person paying taxes on lands prior to 1948

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[3]205 Miss. 80, 38 So.2d 442 (1949).

[4]*Supra* note 1.

[5]The third distinction, that the striking from the records of void tax sales is an encroachment upon the judiciary since it required the opinion of the attorney general, is not important in this discussion of Chapter 491. It requires no discretion in its administration.

[6]As early as 1847 in Grand Gulf RR and Banking Company v. Bryan, 16 Miss. 279, the court said, "The defective links in the chain of title will be supplied by presumption, and the title declared perfect, where the possession has been continued for a great length of time without interruption."

[7]109 Miss. 679, 68 So. 927 (1915). See also Nixon v. Carco, 28 Miss. 414 (1854); Hewling v. Blake, 110 Miss. 225, 70 So. 247 (1915); Dees v. Kingman, 119 Miss. 199, 80 So. 528 (1919); J. H. Leavenworth & Sons v. Hunter, 150 Miss. 245, 116 So. 593 (1928); Presley v. Haynes, 182 Miss. 441, 180 So. 71 (1938); Itawambi County v. Sheffield, 195 Miss. 359, 13 So.2d 649 (1943); Jones v. State, 32 So.2d 435 (1948).

[8]Ethridge, Mississippi Constitutions 222 (1928). The statute of limitations ran against the state prior to 1877.

more probably owned it or in good faith thought he did, for he could gain nothing by paying taxes otherwise. However, since the enactment of the statute many people have an incentive to pay such taxes on lands belonging to the state without any claim of title.

Under the instant act the following factors are important constitutional and operative facts: (1) taxes are not required to be paid annually for ten years, (2) the landowner and his heirs, devisees, or grantees are the only ones for whom the presumption arises, (3) the statute sets up a so-called "conclusive presumption," a rule of substantive law, (4) the validity of the tax sale to the state is not considered, (5) the state does not retain a tax lien for unpaid taxes, (6) no other evidence of a grant from the state is required than the payment of the ten years' taxes, and (7) the tax sale is struck from the records and cancelled.

In considering constitutional difficulties under Chapter 491 a variety of factual situations may arise, but the four most probable types of facts would seem to be: (1) claimant pays ten years' taxes in one lump sum subsequent to the effective date of the statute, (2) claimant pays the required taxes annually after the year 1948,[9] (3) taxes are paid annually prior to 1948, and (4) land has been certified to the state for over forty years. Claimant files his tax receipts, affidavit, and the land commissioner's certificate, and the tax sale is struck from the commissioner's books. A third party, who has been in adverse possession for forty years, asserts title to the land adversely to claimant.[10]

The application of these possible factual situations to constitutional standards are considered in the following pages.

In construing Chapter 491, the court might conclude that the payment of 10 years' taxes is in lieu of 10 years adverse possession. The statute allows a person who has forfeited his land and has not received a grant from the state to claim a title adverse to the states by mere payment of 10 years' taxes. Such an interpretation would result in the conclusion that the act is a statute of limitations, and that it is therefore violative of Mississippi Constitution Section 104, providing that limitations shall not run against the state.[11]

Section 95 of the Mississippi Constitution states that the legislature shall not make direct, or indirect, donations of public lands.

The leading case on this question is *Winton v. Day*,[12] in which a statute somewhat similar to the instant one was involved. The sole question was the constitutionality of Chapter 121 of the Laws of 1908:

> . . . all lands struck off to the state of Mississippi prior to 1875, A.D., for delinquent taxes, and which were not embraced in the list returned that year to the auditor under the Abatement Act and which have not previously and validly been disposed of by the state of Mississippi, and which are now in the possession, actual or constructive, of bona fide owners, and

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[9]The constitutional objections discussed herein point particularly to situations (1) and (2).

[10]In the fourth situation the common-law and the statutory doctrines seem to meet head-on.

[11]For a discussion of statutes of limitation and curative statutes, see Russell Investment Company v. Russell, 182 Miss. 385, 178 So. 815 (1938).

[12]96 Miss. 1, 49 So. 264 (1909).

> legally assessed for taxes as required by law, are hereby relinquished to those persons who, but for the sale or sales, would now be lawfully and equitably the owners thereof, and which said lands were not properly sold and accounted for to the auditor on or before the date of May 10, 1875.

The court held that this act was violative of Constitution Section 95, because it was a donation of lands "belonging to or under the control of the state."

Winton v. Day was argued vigorously by the appellants in *State v. Southern Pine Company*[13] as authority to invalidate the power of the attorney general and the land commissioner to strike and cancel void tax sales. Although the court upheld such power, it made some important distinctions which raise serious questions concerning the validity of the present statute. The court pointed out that the state did not own the lands since by definition the sales to the state were void. But it noted that under the statute in the *Winton* case, there was no prerequisite that the tax sales to the state were void and therefore the state had relinquished lands which it owned. Although the state retained its tax lien in the *Southern Pine* case, it did not do so in the 1908 statute. On the basis of these distinctions the court held there was no donation.

Under the present statute, as in the act involved in *Winton v. Day,* the state may well own the land, because the validity of the tax sale is not involved; and the state does not retain any tax lien.

Under Chapter 491 anyone who has forfeited land to the state for taxes prior to 1923 can pay ten years taxes and without tendering any proof of a grant, or even claiming one, have the tax sale struck from the records. An heir or any person who can get a deed from such past owner is able to get title to the land in the same manner. Is the fact that there must have been a grant from the state the only reasonable conclusion to be drawn?[14] Could there not also be an inference that such person is merely taking advantage of the statute to regain a lost title, a title to which the former owner is no more entitled than any stranger to the land?

Perhaps the validity of this statute under Section 95 of the Constitution depends upon the reasonableness of the presumption, regardless of the time and manner the taxes are paid. Certainly, long possession is the basis for the doctrine of lost grant, and it makes possible a practical and reasonable presumption.[15]

From a perusal of the Mississippi cases following the doctrine it is found that the evidence sustained a reasonable belief that there had been a grant to the predecessors in title to the claimant.[16] The circumstances surrounding the presumption should be such that a reasonable man would believe that a grant had been made to

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[13]*Supra* note 3.

[14]Covington County v. Fite, 120 Miss. 421, 82 So. 308 (1919), "Conclusive, in its primary legal meaning, means beyond question or beyond dispute. Conclusive evidence is . . . that from which only one reasonable conclusion can be drawn taking all the facts and surroundings into consideration."

[15]Grand Gulf RR and Banking Company v. Bryan, 16 Miss. 279 (1847). The law sustains long continued possession by all reasonable presumptions.

[16]In Caruth v. Gillespie, *supra* note 7, there was such evidence as the destruction of the county's records, testimony of a grant from the state, several years tax receipts, and the deraignment of title for the thirty years since the destruction of the records. Therefrom the court presumed that there had been a grant out of the state.

the possessor. As to the effect of the presumption it has been held that this salutory presumption of the law "protects the appellee in the use and enjoyment of this old estate, and at least shifts the burden to appellants to show that the deed was not in fact executed to appellee."[17]

The circumstances required to raise the presumption are uniformly long continued possession and acts of ownership.[18] But the mere payment of taxes for 10 years is not enough to raise the presumption of a lost grant as evidenced by the decision in the case of *Dees v. Kingman*.[19]

Although the doctrine of lost grant may be said to be a fiction, it is not without basis in fact. The shortest period of possession to which the Mississippi Supreme Court has applied the doctrine is 30 years.[20] In each case there were facts that would lead a reasonable man to believe there had been a grant. But here the legislature seems to have made a statutory presumption, which, if not true, would be a donation of state lands; and the presumption does not appear to have a basis in fact because in many, if not most, of the claims arising under the act there would have actually been no grant. Where the taxes are paid after the passage of the statute, it appears to be a more reasonable conclusion that the claimant is merely taking advantage of it to regain his lost title. Certainly no one can believe beyond a reasonable doubt that a grant has been made and lost. The object of Section 95 of the Constitution is "to preserve the state's property and to secure equal rights by individuals in purchasing the public lands of the state."[21]

Section 90 of the Constitution provides that the

> legislature shall not pass local, private or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.; . . . (u) Granting any lands under the control of the state to any person or corporation.

In discussing this section Judge George H. Ethridge says,

> This will be readily seen was a great evil as it gave terms to particular buyers not available to others. Frequently these lands were granted in large quantities for inadequate considerations. . . . These clauses in section 90 are much more important than will appear on casual study. They make for the general welfare and eliminate much of the evils of lobbying with which the state has often been cursed.[22]

Special laws discriminate between persons of the same class doing the same act.[23] Are sales by the state of land acquired by it at tax sales prohibited except to

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[17]Hewling v. Blake, *supra* note 7. The Alabama court has held that the presumption is rebuttable in favor of the state or its grantees. Carter v. Walker, 186 Ala. 140, 65 So. 170 (1914).

[18]The importance of possession in presuming a grant is expressed in the recent case of Itawamba County v. Sheffield, 195 Miss. 359, 13 So.2d 649 (1943), in which the court said that the lost grant doctrine is inherent in the doctrine of prescriptive title by immemorial possession and use; *cf.* Caruth v. Gillespie, *supra* note 7. The presumption exists independent of any statute of limitations.

[19]119 Miss. 199, 180 So. 528 (1919).

[20]Caruth v. Gillespie, *supra* note 7; *cf.* Carter v. Walker, *supra* note 17 (the Alabama doctrine specifies twenty years possession).

[21]Ethridge, Mississippi Constitution 214 (1928).

[22]*Id.* at 211.

[23]50 Am. Jur. 22.

the person who forfeited such land to the state? Of course a stranger to the title may purchase such property. Consequently, a grant to one of these strangers may be lost the same as a grant to the landowner. But the statute sets up a presumption of a lost grant only in favor of "the person who was the owner at the time of the sale to the state, his heirs or grantees, when such owner, his heir or grantee, shows the payment of 10 years taxes." Why should not the same presumption arise when a stranger pays taxes for ten years? If the land belongs to the state, the former landowner stands in the same light as a stranger,[24] in so far as the manner of purchasing state property. Hence it would seem that the statute is special because it does not raise the presumption in favor of everyone in the class to whom a lost grant may have been made.

Winton v. Day[25] seems to be in point on this question. The court, in speaking of the statute involved there,[26] said,

> It is seen that the act is special, it is private, and it grants lands under the control of the state to private individuals; that is to say, it makes a grant to lands which 'have not previously and validly been disposed of by the state' . . . and these lands, now validly owned by the state and under its control, are granted to those persons, and those only, 'who, but for the prior sale or sales to the state, would now be the lawful and equitable owners.' Compare this section of the statute with paragraph (u) of section 90 of the Constitution, which provides that there shall not be any grant 'of lands under the control of the state to any person or corporation,' and the conflict of this section of the statute with the clause of the constitution just quoted is so perfectly apparent that it can admit of no question. . . .
>
> Under no provision of the statute in question is the land which the statute attempts to deal with open to acquirement of all persons; but it can only be acquired by certain persons named in the act, and the act makes the grant to them to the exclusion of all other persons. . . .

Although Chapter 491 does not make an outright grant of property belonging to the state as did the statute involved in *Winton v. Day,* yet, as a practical matter, the court might well say that it does. Today a grant of state lands must contain a reservation of mineral interests to the state.[27] Striking the tax sale dissolves all interest held by the state; and where no grant was ever made and lost, the payment of 10 years taxes is often far below the value of the land.

Conclusions and Suggested Changes

The actual effect of a statute should be the important test in determining its constitutionality. From a practical standpoint all of the tax lands in Mississippi belonging to the state for 25 years would seem to be affected by Chapter 491. It offers all such lands for the benefit of the former owner and his privies. If he

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[24]Miss. Code § 717 (1942) provides the landowners remedy when his property is sold for taxes. See Russell Investment Company v. Russell, *supra* note 11. At the expiration of this remedy the landowner and stranger to the land have the same rights.

[25]*Supra* note 12.

[26]Miss. Laws 1908, c. 121.

[27]Miss. Code § 4078 (1942).

wants it back he just pays 10 years taxes. This broad effect, coupled with the exclusion of other persons, raises serious constitutional doubts.

The courts resort to fictions when justice can be done in no other way; and these fictions usually have some basis in fact, as shown by the common law doctrine of a lost grant. But, is a fiction permissible under these circumstances?[28]

It is suggested that the proper step to be taken first is a constitutional change, which would enable the legislature to dispose of worthless tax lands. Just what this change should be this note does not undertake to prescribe. The policy of the legislature is bound necessarily by a constitution which reflects the policy of the people in the Convention of 1890.

Yet, the purpose of recognizing mistakes in the recording of grants from the state may be effectuated. In this respect the act is within the state's power if all persons injured by such inadvertance are protected. The constitutional prohibition to special laws could be avoided by including in the act all persons to whom a grant may be made.

By requiring additional proof of a grant and adhering more closely to the lost grant doctrine, the statute may raise a reasonable presumption and have a much narrower effect. The difficulty of administering an act which requires possession is recognized. However, since long continued possession is the crux of the doctrine, the statute should require at least 15 years of possession along with the annual payment of taxes, claim of ownership, and deraignment of title. The administrative task of verifying possesion could be handled by affidavits of the claimant and some other responsible person which should be sufficient under most circumstances. If no other person is available, the affidavit of claimant along with a statement of reasons why no other person could affirm should be sufficient.

John Marshall Grower

1949 AMENDMENTS TO THE FAIR LABOR STANDARDS ACT*

This note is a discussion of the significant changes in the Fair Labor Standards Act of 1949.[1] It will be general, with no attempt to delve into speculative situations that will arise under the new act. That must await the new administrative regulations. However, the statutory changes and the probable trend which the regulations will take under the new act are apparent.

Wages

The only change in the new law regarding wages is the increase to the seventy-five cent per hour minimum.[2] Under the new act, the definition of "wages" remains the same.[3] The furnishing of board, lodging, or other facilities is includable,[4] along with the regular hourly rate of pay. However, profit realized from the furnishing of such facilities must be deducted before the facilities can be computed as part of the

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[28]Miss. Const. § 95 prohibits indirect donations as well as direct donations.

**Editor's note:* The first of the new regulations under the 1949 Amendments have been published since this article went to press. 29 Code Fed. Regs. § § 778.0-778.27 (Interpretive Bulletin, Part 778, Jan. 1950).

[1]Pub. L. No. 393, 81st Cong., 1st Sess. (Oct. 26, 1949).

[2]*Id.* § 6(a)(1).

[3]*Id.* § 3(m).

[4]*Ibid.*

minimum wage.[5] This was the rule under the old law, and the validity of regulations and court decisions promulgated under the old law remain unaffected, unless specifically changed by the new act.

No facilities may be furnished the employee at a profit to the employer, if thereby the compensation to the employee will be brought below the minimum.[6] There would seem to be no reason for the courts to alter the rulings made under the old act, that employer-employee agreements regarding facilities do not need administrative sanction to validate them.[7]

Overtime

The basic provision regarding overtime remains the same in the new act. It provides pay to the employee for those hours worked in excess of forty per workweek, at "a rate not less than one and one-half times the regular rate at which he is employed."[8] Under the old law, the only requirement for a "workweek" was that it consist of seven consecutive days. "It need not coincide with the calendar week, but may begin on any day and at any time of any day."[9] There seems to be no reason to expect any change in this definition.

The difficulty of this provision has centered around the definition of "regular rate." Neither the original act nor its legislative history provided a definition. As a consequence, a confusing body of rules and decisions were built up. These culminated in the "overtime-on-overtime" decision of the Supreme Court.[10] By this decision, the Court held premium pay to be includable in the computation of "regular rate," unless it was given for work in excess of a specified number of daily or weekly hours. Thus, employers already paying premium pay were in many cases required to pay a substantially larger amount because of that premium. An earlier decision had held incentive bonuses to be includable in the regular rate.[11]

Soon after the *Bay Ridge* case, the Congress passed the Overtime-on-Overtime Act of 1949.[12] This act determined the status of various types of overtime pay. The provisions of this act were included in the definition of "regular rate," as set forth in Section 7(d) of the present act. The Overtime-on-Overtime Act is thereby repealed[13] as of the date the new law went into effect.[14] However, the retroactivity of the Overtime-on-Overtime law is reinstated by Section 16(e) of the new act.

Section 7(d) defines "regular rate" by setting forth seven types of payments which may be excluded, and providing that all other remuneration shall be included. These excludable payments are:

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[5]Wage-Hour Div., Interpretive Bulletin, Part 777, §§ 777.11, 777.12 (Jan. 30, 1948).

[6]*Id.* § 777.7.

[7]Andrus v. Harding, CCH 3 Lab. Cas. ¶ 60, 180 (W.D. Tenn. (1940).

[8]*Supra* note 1, § 7(a).

[9]Wage-Hour Div., Interpretive Bulletin No. 4, § 3 (Nov. 1940).

[10]Bay Ridge Operating Company v. Aaron, 334 U.S. 446 (1948); see also Roland Electric Company v. Black, 163 F.2d 417 (1947).

[11]Walling v. Youngerman Reynolds Hardware Company, Inc., 320 U.S. 419 (1945).

[12]Pub. L. No. 177, 81st. Cong., 1st. Sess. (July 20, 1949).

[13]*Supra* note 1, § 16(f).

[14]January 25, 1950.

1. Gifts, which are in no way connected with hours worked, production, or efficiency. This involves no change in fact, since administrative interpretation of the old law held likewise.

2. Payments for periods not worked, such as vacations, holidays, illness, or "call-in" pay.[15]

3. Bonuses, either (a) discretionary, or (b) pursuant to a bona fide profit sharing or savings plan. "Talent fees," including payments to radio and television performers, are excludable under the new act. The discretionary clause here seems to be very narrow, since the employer must decide to give this bonus "at or near the end" of the period for which the bonus is given. The administrator has broad regulatory power concerning this clause.[16] He will probably place the burden on the employer to show that the decision was indeed made "at or near the end" of the bonus period. Bonuses made with such regularity as to lead the employee to expect them will probably be includable in the regular rate. Such was the rule under the old law.

Administrative interpretation of the old law held that production bonuses must be included in the regular rate.[17] The new act directs the administrator to give "due regard" to the question of whether profit sharing or savings bonuses are dependent on hours of work, production, or efficiency.[18] The wording here is vague, and it is not clear whether the act is intended to forbid exclusion of such bonuses from the regular rate. Since the conference report sheds no light on the matter, it is submitted that the administrator will probably issue regulations so forbidding.

4. Pensions and insurance payments made by the employer are excludable, provided all such payments are irrevocable.[19]

5. Premium payments are excludable where the payments are for any hours worked, over eight per day or forty per week, or over the employees' "normal or regular" working hours.[20] This section represents a slight extension over the holding of the *Bay Ridge* case.[21] In that case premium payments in excess of forty weekly hours automatically became overtime; this act also includes payments for daily hours worked over eight.

Section 7(d)(6) and (7) is essentially a restatement of the Overtime-on-Overtime Act,[22] and is intended to effectuate the same end. The conference report makes this clear.[23] Because of this, the court decisions and regulations interpreting the Overtime-on-Overtime Act should apply with equal force to these provisions of the present act.

6. Section 7(d)(6) excludes premium pay for work done on Saturdays, Sundays, holidays, regular days of rest, and the sixth and seventh days of the week,

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[15]Failure of employer to provide work after employee reports therefor.
[16]H.R. Rep. No. 1453, 81st Cong., 1st Sess. 20 (1949).
[17]*Supra* note 9, § 9.
[18]*Supra* note 1, § 7(d)(3)(b).
[19]*Supra* note 1, § 7(d)(4).
[20]*Supra* note 1, § 7(d)(5).
[21]*Supra* note 10.
[22]*Supra* note 12.
[23]*Supra* note 16.

provided the premium pay is one and one-half times the straight time rate. If the premium is paid for work on Saturday or Sunday or a day off, as such, without regard to the number of previously worked hours in that workweek, the premium is merely a "shift differential." As such, it must be included in the overtime computation.[24] Likewise, premium payments for dirty or hazardous work must be included.

7. Section 7(d)(7) provides for exclusion of premium pay determined pursuant to an employer-employee bargaining agreement. Once again, the premium must be one and one-half times the straight time rate in order to be excludable.

Here it should be noted that, of the seven types of excludable pay discussed above, the first four catagories (*i.e.* gifts, non-working and travel pay, bonuses, pensions and insurance payments) may not be credited as overtime pay, but may only be excluded from the computation of "regular rate."[25] The three types of premium pay, on the other hand, may be excluded from the regular rate, as well as credited as overtime premiums.[26]

Employees with fluctuating hours of work presented serious bookkeeping problems under the old act. Various plans to legitimize a regular salary for such employees were devised. The plan in most prevalent use today was upheld by the Supreme Court in the case of *Walling v. Belo Corporation*.[27] Under that decision, employees whose work hours fluctuate may be paid guaranteed weekly amounts, provided certain conditions are met. The conditions required of these "Belo contracts" are: (1) specified hourly rate of pay; (2) payment of this rate to the employee for the first forty hours, and not less than time and a half this rate for all hours over forty; and (3) a guaranteed weekly wage, plus overtime if the employee works enough hours to earn more than the guaranteed weekly wage. Since the *Belo* decision, it has been held that the specified hourly rate must bear a reasonable relation to the guaranteed weekly wage.[28] Of course, fictitious rates will defeat a plan, even though all other requirements are met.[29]

Section 7(e) of the present act is nothing more than a restatement of the *Belo* decision. The three conditions necessary to validate a contract are incorporated. There is only one distinction: in the act, the maximum number of hours that such a contract may cover is sixty. No such limit was fixed by the Supreme Court in the *Belo* case.

Section 7(f) outlines three instances in which the employer and the employees may enter into agreements as to the basic rates, for the purpose of overtime compensation. There was no such provision in the old act. These instances are:

1. Piecework. Before this act, piecework was computed via the basic regular rate formula.[30] Now, piecework overtime may be computed at one and one-half

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[24]Bay Ridge Operating Company v. Aaron, *supra* note 10.
[25]*Supra* note 16, at 19.
[26]*Supra* note 16, at 20.
[27]316 U.S. 624 (1942).
[28]*Supra* note 11.
[29]McComb v. Sterling Ice and Cold Storage Company, 165 F.2d 265 (10th Cir. 1947).
[30]$\frac{\text{Total weekly earnings}}{\text{Weekly hours worked}} \times 1\frac{1}{2} = \text{overtime rate.}$

times the piece rates applicable to the same work when performed during non-overtime hours.

2. Two rates of pay for the performance of two kinds of work. Under the *Bay Ridge* case,[31] the regular rate in a situation such as this was computed by averaging the two rates. Now, if the employer desires, he may pay the employee at one and one-half times the rate actually payable for the kind of work performed during the hours worked over forty. These "overtime hours" need not be true overtime (*i.e.* they need not occur after the fortieth hour of the workweek), so long as there is an overtime payment for "a number of hours equivalent to the number worked over forty."[32]

This provision will, of course, enable the employer who uses this system to utilize the cheaper type of work to its fullest advantage, in computing overtime.

3. The administrator may authorize an agreed basic rate for overtime computation, provided that such rate is "substantially equivalent" to the actual average hourly earnings of the employee. It would seem certain that the administrator will interpret this "substantial equivalence" requirement narrowly.

By the terms of the act, certain requirements must be met before any one of the above three methods may be utilized. The method must be adopted only pursuant to an advance employer-employee agreement. The average hourly earnings, exclusive of deductible premiums, must be at least seventy-five cents. The workweek, and the workweek only, must be the basis for computation. No shorter or longer period is permissible.

Hours Worked

Before the Portal Pay Act of May 14, 1947,[33] the basic rule determining working time was: hours worked included (1) all time during which employee was required to be on duty or on employer's premises or at a prescribed place, or (2) all time when he was allowed to work, whether he was required to do so or not. This principle was applied to coal and iron mines,[34] to open pit copper mines,[35] to the logging and lumber industry,[36] and finally to a manufacturing company.[37] This last development precipitated a flood of suits for back pay, and it was at this point that the Congress enacted the Portal Pay Act. Under it, claims to pay for certain activities must be based on contract, custom, or practice. These activities include: walking, riding, or otherwise travelling to and from places of principal activities; or for activities "preliminary or postliminary" to principal activities.[38] The constitutionality of this act, with particular attention to the aspect of retroactvity, has been upheld by the courts.[39] Rulings under the Portal Act had held that clothes changing

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[31] *Supra* note 10.
[32] *Supra* note 16, at 21.
[33] 61 Stat. 84 (1947), 29 U.S.C.A. 251 (Supp. 1948).
[34] Tennessee Coal, Iron, and R.R. Co. v. Muscoda Local, No. 123, 321 U.S. 590 (1944); Jewel Ridge Coal Corp. v. Local No. 6167, 325 U.S. 161 (1945).
[35] Opinion Letter, Solicitor, U.S. Dept. of Labor (Apr. 27, 1945).
[36] Walling v. Anaconda Copper Mining Co., 66 F. Supp. 913 (D. Mont. 1946).
[37] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).
[38] For administrative definitions and regulations covering this act, see *supra* note 5, Part 790 (Nov. 18, 1949).
[39] Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948); Thomas v. Carnegie-Illinois Steel Corp., 174 F.2d 711 (3rd Cir. 1949); Manasky v. Bethlehem-Hingham Shipyard, Inc., 177 F.2d 529 (1st Cir. 1949).

was compensable, if necessary to the principal activity.[40] Section 3(o) of the amended act permits the exclusion of such time by virtue of a collective bargaining agreement.

Other than this provision, the 1949 amendments make no change in the Portal Pay Act.

Child Labor

The new law contains five changes related to child labor. There is a direct prohibition of the employment of children in commerce or in the production of goods for commerce.[41] This involves two changes. The old law covered production alone and not commerce itself; the amendment remedies this oversight. Also, the amendments contain a direct prohibition of the use of child labor. The old act merely prohibited interstate shipment of goods produced by child labor, within thirty days of the use of such labor.

Children working in agriculture are not to be employed "during school hours."[42] The old law merely prohibited such employment "while not legally required to attend schools." Such change is intended to prevent the practice of legally excusing children from the regular school sessions for agricultural purposes. Wage-Hour investigation of this matter will be greatly simplified under the new law.

Radio and television performers are exempt under the new law.[43] The old law applied only to child actors in the moving pictures and the theatre.

The new law prohibits parental employment of children under eighteen years of age in occupations defined as "hazardous."[44] As stated by the House report, this amendment

> is designed to close a loophole in the old Act, whereby a parent . . .' who may not employ his child in a hazardous occupation if between sixteen and eighteen years of age, is permitted to employ the child in such an occupation until he reaches sixteen years of age.[45]

General Coverage

The coverage of the act depends on the employee being engaged in "commerce" or in the production of goods for commerce.[46] This extends to industries merely "affecting" commerce.[47] It does not extend to purely intrastate industries which are in competition with interstate industries.[48]

Nothing in the new act affects these basic rules. The only change is an extension of the definition of "commerce," so as to include employees of firms importing goods from abroad.[49] The old act extended to exporters only.[50]

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[40]*Supra* note 5, Part 790, § 790.8 (Nov. 18, 1947).
[41]*Supra* note 1, § 12(c).
[42]*Supra* note 1, § 13(c).
[43]*Ibid.*
[44]*Supra* note 1, § 3(1).
[45]*Supra* note 16, at 15, 16.
[46]U.S. v. Darby Lumber Co., 312 U.S. 100 (1941).
[47]Kirschbaum v. Walling, 316 U.S. 517 (1942).
[48]Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943).
[49]*Supra* note 1, § 3(b).
[50]*Supra* note 16, at 13.

The definition of "produced" has been changed by the new act.[51] Formerly, "production" included "any process or occupation necessary to the production . . ." of goods. This was aimed at so-called "fringe" production employees. The amended act has changed the coverage to include any employee engaged in "any closely related process or occupation directly essential to the production . . ." of goods. On its face the amendment seems broad. However, the committee report infers that the Congressional intent behind the change was the exclusion of certain borderline cases. No general narrowing of coverage was intended.[52] It is intended to reverse former cases which included within the coverage of the act local merchants, some of whose customers are producing goods intended for interstate commerce;[53] local service establishments in the same situation;[54] employees of an independently owned and operated restaurant located within a factory.[55] It is not intended to exclude repair and maintenance men whose work is with buildings or installations in which goods are produced for commerce.[56]

The Senate report concerning this proposed change infers that its prime purpose is clarification, and not any general narrowing of coverage.[57] Nevertheless, it is submitted that the real significance of this provision is that the whole question of coverage of "fringe" employees has been thrown into the courts for redetermination. The factual basis of the individual case will control, and the application of this provision by the courts is purely a matter for conjecture at this writing.

Exemptions

Exemptions are determined on a workweek basis. The Wage-Hour Division rule is that any covered work will bring the employee within the act for the entire week.[58] However, it has been held that a "substantial" part of the employee's work must relate to goods moving in interstate commerce before the act may apply.[59] One per cent has been held not to be substantial.[60] In a recent case, the *de minimis* doctrine was applied to a question of ten minutes per day overtime.[61]

From these examples, the confusion of the courts and the administrator concerning this particular question is apparent. The new act does nothing to clarify this problem.

The changes in exemptions under the act fall into four catagories: (1) new exemptions, (2) broader exemptions, (3) lesser exemptions, and (4) retail and service trade exemptions. These will be discussed in detail. It should be borne in mind that all exemptions under the act must be narrowly construed.[62]

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[51] *Supra* note 1, § 3(j).
[52] *Supra* note 16, at 14, 15.
[53] McComb v. Deibert, CCH Lab. Law Rep., ¶ 65, 498 (3rd Cir. 1949).
[54] Martino v. Michigan Window Cleaning Co., 327 U.S. 173, *rehearing denied*, 327 U.S. 816 (1945).
[55] McComb v. Factory Stores, 8 F. Supp. 403 (N.D. Ohio 1948).
[56] *Supra* note 47.
[57] 95 Cong. Rec. 15372 (Oct. 19, 1949).
[58] *Supra* note 5, Part 776 (July 11, 1947).
[59] *Supra* note 48.
[60] Mile High Poultry Farms, Inc. v. Frazier, 113 Colo. 338, 157 P.2d 125 (1945).
[61] Green v. Planter's Nut and Chocolate Co., CCH Lab. Law Rep. ¶ 65, 382 (4th Cir. 1949).
[62] A. H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945).

New Exemptions

Employees of mutual irrigation ditches are exempt,[63] when those ditches are non-profit, and are used exclusively for supplying and storing water for agricultural purposes. This amendment was probably added to nullify a recent Supreme Court ruling,[64] which held: (1) operation of an irrigation system was not agricultural work; (2) the employees were neither farmers nor employed by farmers, since they worked for the company and not for the farmer stockholders; and (3) the work was not performed for the farmers, but for an independent business entity.

By specifically exempting workers for irrigation cooperatives, the Congress seems to approve impliedly the administrative ruling regarding farm cooperatives in general. This rule holds them not farmers, within the meaning of the act.[65]

Employees engaged in forestry operations are exempt.[66] The administrator has interpreted provisions of the old act related to lumbering operations very narrowly. It has held such operations exempt as agriculture only if performed by a farmer for farm purposes.[67] Under the amended act, employees of an employer engaged in forestry or lumbering operations are exempt, provided such employees do not exceed twelve. This exemption is restricted to "wood operations, and . . . the preparing and transporting of logs or other forestry products . . . to their immediate destination."[68]

Other new exemptions include: taxicab employees,[69] buttermilk processors,[70] newsboys,[71] radio and television performers,[72] and contract telegraph agencies.[73]

Broader Exemptions

The new act considerably expands the exemptions of small newspapers.[74] Daily as well as weekly papers are now included, and the circulation allowable is 4,000 instead of the former 3,000. Counties contiguous to the home county may now be considered in determining whether the "major part" of the circulation is local. The contiguous counties need not be in the state where the publication takes place.[75]

The maximum number of telephone stations below which there may be an exemption is raised by the new act to 750. The old maximum was 500 stations. The exchange must still qualify as a "public utility" in order for the exemption to apply.[76]

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[63] *Supra* note 1, § 13(a)(16).
[64] Farmers Reservoir and Irrigation Co. v. McComb, 337 U.S. 755 (1948), *rehearing denied*, 70 Sup. Ct. 31 (U.S. 1949).
[65] *Supra* note 5, Part 780, Subpart C (Nov. 27, 1947).
[66] *Supra* note 1, § 13(a)(15).
[67] *Supra* note 5, Part 780, Subpart B (Nov. 27, 1947).
[68] *Supra* note 16, at 29.
[69] *Supra* note 1, § 13(a)(12).
[70] *Supra* note 1, § 7(c).
[71] *Supra* note 1, § 13(d). This exemption extends to the child labor provisions, as well as wages and hours. See *supra* note 16, at 30.
[72] *Supra* note 1, § 13(c). This provides an exemption from the child labor provisions only.
[73] *Supra* note 1, § 13(a)(13).
[74] *Supra* note 1, § 13(a)(8).
[75] *Supra* note 16, at 28.
[76] Cherry Lake, Inc. v. Kearce, 157 Fla. 484, 26 So.2d 434 (1946).

An amendment broadens the overtime exemptions under a guaranteed wage agreement.[77] Rigid administrative interpretation of the old law had made such contracts virtually a dead letter.[78] Under the new act, greater flexibility is allowed regarding the number of yearly or bi-yearly hours of work that may be contracted for. An employer is no longer confronted with the peril of voiding all the permissible overtime tolerance, because the employee slightly exceeds the number of work hours contracted for.[79] Overtime must still be paid, however, for hours worked over twelve daily, or fifty-six weekly.[80]

Lesser Exemptions

Airline employees and fish cannery employees are now subject to the minimum wage requirements.[81]

Retail and Service Trade Exemptions

The new act defines exempt retail sales to include sales in substantial quantities to business organizations and farmers, and exempts manufacturer-retailers. This has been done in order to obviate administrative and judicial decisions holding that virtually no sale of goods or services for business use was retail.[82]

The new amendments divide retail and service establishments into three catagories: (1) retail and service establishments, (2) retail establishments producing or processing goods, and (3) laundries or dry cleaners.

The new act sets up three tests which a retail or service establishment must meet to be exempt.[83] First, over fifty per cent of the establishment's annual dollar sales must be made within the state in which the establishment is located. The old law required the greater part of the selling or servicing to be in intrastate commerce. The courts have interpreted the old exemption very narrowly,[84] which necessitated the change.[85] Second, at least seventy-five per cent of an establishment's annual dollar sales volume must not be for resale. "Resale" is defined to exclude the sale of goods to be used in residential or farm building, construction, repair, or maintenance.[86] Third, the sale must be recognized as a retail sale in the particular industry. The conference report states that neither large mail order houses, nor warehouses, nor central offices for chain store systems, are exempt.[87] This affirms a recent Supreme Court ruling.[88] However, employees of such establishments, who handle goods which have already been sold through retail outlets, were held exempt under the old law.[89] There will probably be no change in this situation under the law as amended.

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[77] *Supra* note 1, § 7(b)(1,2).
[78] *Supra* note 9, § 72.
[79] *Supra* note 16, at 18.
[80] Wage-Hour Div., Interpretive Bulletin No. 8, § 30 (Nov. 1940).
[81] *Supra* note 1, § 13(b)(3).
[82] Roland Electric Co. v. Walling, *supra* note 10; McComb v. Deibert, *supra* note 53; McComb v. Factory Stores, *supra* note 55.
[83] *Supra* note 1, § 13(a)(2).
[84] *Supra* note 47.
[85] *Supra* note 16, at 24.
[86] *Supra* note 1, § 3(n).
[87] *Supra* note 16, at 25.
[88] *Supra* note 62.
[89] Montgomery Ward v. Antis, 158 F.2d 948 (6th Cir. 1947), *cert. denied,* 331 U.S. 811 (1947).

Retail establishments producing or processing goods must qualify as an exempt retail establishment under the three tests discussed above. In addition, the establishment must be recognized as retail in the particular industry; over eighty-five per cent of the manufactured or processed goods must be sold within the state where made; and the making or processing must take place in the same establishment wherein the goods are sold.[90] This exemption is intended to apply particularly to bakery establishments which bake the bread and pastries they sell; to ice plants which manufacture the ice they sell; and to ice cream parlors or candy kitchens which make their own ice cream or candy.[91]

Under the old act, laundries or dry cleaners could not sell more than twenty-five per cent of their services to any kind of business.[92] Under the new law[93] they may make unlimited sales to such establishments as barber shops, schools, restaurants, or hotels.[94] The only requirements for exemption are: (a) over fifty per cent of the dollar volume of sales is from within-the-state sales, and (b) not more than twenty-five per cent of such sales be made to mining, manufacturing, transportation, or communication companies.

Administration and Enforcement

There were only three changes of any importance in the administration and enforcement of the new act. Perhaps the most important is the change regarding the "hot goods" provision. As originally written, the act flatly prohibited the transportation or sale of any goods produced in violation of its terms.[95] A violation anywhere along the line of production or transportation subjected all the parties to both criminal actions and injunctive proceedings. This provision was upheld as a valid exercise of the plenary commerce power of Congress.[96] Although seldom enforced to the fullest, the provision was manifestly an imposition on innocent purchasers. To relieve them of this imposition, the amended act provides that persons who innocently acquire hot goods will not violate the FLSA by subsequent transportation or sale, if such person have: (1) acquired the goods in good faith in reliance on written assurance from the producer that the act was complied with, and (2) acquired the goods for value without notice of any violation. The conference report states that the "reasonable, prudent man" test will be applied in determining "good faith."

Under the new act, the administrator may supervise the payment of unpaid minimum wages or unpaid overtime compensation owing to the employees.[97] An employee's agreement to accept such payment will constitute a waiver of his right to sue for the unpaid wages and any liquidated damages. The administrator's supervisory right may include the right to compromise claims. However, it is submitted that this is doubtful, in view of the Supreme Court's past attitude toward such compromises. The Court has reasoned that the statutory obligation must be paid in full to satisfy the public interest that is inherent in the act.[98]

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[90] *Supra* note 1, § 13(a)(4).
[91] *Supra* note 16, at 27.
[92] Wage-Hour Div., Enforcement Policy, Part 779, § 779.2 (Mar. 17, 1948).
[93] *Supra* note 1, § 13(a)(3).
[94] *Supra* note 16, at 26.
[95] *Supra* note 1, §§ 12, 15(a)(1).
[96] *Supra* note 46.
[97] *Supra* note 1, § 16(c).
[98] Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); Schulte v. Gangi, 328 U.S. 108 (1946).

The new act authorizes the administrator to sue to recover unpaid minimum and overtime wages due an employee provided the employee files a written request, and the suit does not include an unsettled question of law.[99] However, the administrator may not recover liquidated damages in such a suit, as the employee may.

Prior to the amendments, it was the practice of the administrator to bring an injunction proceeding, pursuant to Section 17, and then request a mandatory back pay order be incorporated into the decree.[100] Wage payment orders, or orders for liquidated damages in injunction suits, are specifically forbidden by the new act.[101]

Robert D. Patterson

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[99]*Supra* note 1, § 16(c).
[100]McComb v. Scerbo, CCH LAB. LAW REP., ¶ 65, 297 (2d Cir. 1949).
[101]*Supra* note 1, § 17.

RECENT DECISIONS

Administrative Law—Oral Argument Not Essential Element of Hearing on Matters of Law

The Federal Communications Commission granted an application for a broadcasting permit to Company A. Company B, whose clear channel was affected by A's license, petitioned the Commission to reconsider the permit granted to A or to postpone action until the conclusion of a then-pending separate proceeding before the Commission to allow Company B to increase its broadcast strength. Company A intervened and moved to dismiss B's petition on grounds of legal insufficiency.[1] The Commission dismissed the latter without giving B an opportunity for oral argument. The statute[2] provided for oral argument only in initial hearings and as to other proceedings petitioner must be given "reasonable opportunity" to present his arguments. The Commission considered here only written submissions. Held: There was no abuse of discretion or due process in denying oral argument on questions of law.[3] *Federal Communications Commission v. WJR, The Goodwill Station,* 69 Sup. Ct. 1097 (U. S. 1949).

Where an administrative proceeding is judicial in nature, apparently the general rule is that notice and hearing are required under the due process clause.[4] Also, a fair hearing is required,[5] but it has long been settled that no particular form of procedure is guaranteed, if substantial rights are protected and the procedure is fair.[6] From the basic meaning of the word "hearing" and from its common usage, it is usually accepted as including oral argument, but this issue has never before been squarely presented to the court on the question of administrative determination of questions of law. However, there are some guiding principles relating to the determination of questions of fact. The earliest of these is *Londoner v. Denver,*[7] which holds that oral argument before an administrative tribunal is an essential element of a hearing.

In four later instances[8] the court has held that the denial of a request for oral argument before the Commission, where there had been a previous hearing with oral argument before an examiner, was not a denial of due process. In *Eastland Company v. Federal Communications Commission,*[9] petitioner's oral argument was heard by one of three members of the Board who decided his case and no motion for rehearing

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[1]The alleged interference was not within the protected areas of B's broadcast range as specified in the regulations; hence B's petition failed to state any basis for B to be made a party in A's licensing proceeding.

[2]48 Stat. 1086 (1934), 47 U.S.C.A. § 312(b) (Supp. 1948).

[3]Reversed to Court of Appeals to decide the legal sufficiency of the petition, uncomplicated by questions of constitutionality relating to the Commission's procedure.

[4]DeLucca's Liquor License Case, 124 Pa. Super. 500, 190 Atl. 195 (1937).

[5]Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292 (1937); Federal Communications Commission v. National Broadcasting Co. (KOA), 319 U. S. 239 (1943).

[6]National Labor Relations Board v. MacKay Radio & Telegraph Co., 304 U. S. 351 (1938); Yakus v. United States, 321 U. S. 414 (1944).

[7]210 U. S. 373 (1908).

[8]Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co., 289 U. S. 266 (1933); Woodmen of the World Life Ins. Co. v. Federal Radio Commission, 65 F.2d 484 (D.C. Cir. 1933); Morgan v. United States, 304 U. S. 1 (1938); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938).

[9]92 F.2d 467 (D.C. Cir. 1937).

was made. The court held that the essentials of due process were complied with. This was followed in 1945 by the case of *Levers, Admr. v. Anderson, District Supervisor, Alcohol Tax Unit*,[10] where the court said that even though petitioner had not requested a hearing which, if granted, would have offered him, for the first time, an opportunity of oral argument before the deciding officer, petitioner had exhausted his administrative remedies sufficiently to secure judicial review.

In *Mortgage Underwriting Company v. Bowles*,[11] it was held that where relevant facts may be submitted in written form, denial of oral argument in the discretion of the administrator was consistent with due process.[12]

It is said that the requirement in the *Londoner* case[13] of oral argument does not apply on behalf of a prior licensee in an independent licensing procedure where the latter will not affect the former's protected and licensed rights.[14] The right of oral argument as a matter of procedural due process would seem to vary from case to case in accordance with differing circumstances, as do other procedural regulations.

However, these cases have dealt with hearings to determine in part, at least, particular facts. The principal decision seems to be the first in which the issue of the right to oral argument before an agency is squarely presented in the determination of matters of law only. It is traditionally thought that parties should have the opportunity to face their judges and use whatever oral persuasion they can command to convince the judges of the justness of their cause. Yet the court in the instant case seems to have reached a sound conclusion. The procedure is analogous to the practice in appellate courts where oral argument is not a matter of right. It is likewise analogous to the cases which deny a rehearing on matters of law and fact.[15] Since the most recent decisions hold that oral argument is not always an essential element of procedural due process in a hearing to determine the facts of the case, a *fortiori* oral argument is not always necessary in the determination of questions of law, because the primary purpose of oral argument is to test the credibility of witnesses by observation and cross-examination. The question is one for case-by-case determination in either instance. The difficulty of distinguishing questions of law from those of fact further emphasizes the necessity of flexible application. The decision in the instant case will promote administrative efficiency without denying substantial rights of litigants.

Bonnie Mills

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[10]326 U. S. 219 (1945).

[11]150 F.2d 411 (9th Cir. 1945).

[12]Mitchell v. Reichelderfer, 57 F.2d 416 (D.C. Cir. 1932); Johnson & Wimsatt v. Hazen, 99 F.2d 384 (D.C. Cir. 1938); Peoria Braumeister Co. v. Yellowley, Dist. Supervisor Alcohol Tax Unit, Treas. Dept., 123 F.2d 637 (7th Cir. 1941).

[13]*Supra* note 7.

[14]Federal Communications Commission v. Pottsville Broadcasting Co. 309 U. S. 134 (1940).

[15]Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co., 289 U. S. 266 (1933); Woodmen of the World Life Ins. Co. v. Federal Radio Commission, 65 F.2d 484 (D.C. Cir. 1933); Morgan v. United States, 304 U. S. 1 (1938); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938).

Appeal and Error—Jurisdiction of the United States Supreme Court to Consider Errors Not Raised in State Court

Petitioner, member of right wing Christian Nationalist organization, was charged with disorderly conduct in violation of city ordinance[1] after having made a scheduled speech which was anti-semitic, anti-communist, and anti-new deal at a meeting picketed by left wing sympatizers and already a public disturbance when speaker arrived. Police escorted petitioner into the hall and narrowly averted a full blown riot when the meeting continued. Court instructed jury, which brought in general verdict of guilty, that defendant should be found guilty if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. Petitioner maintained at all times that as applied to him the ordinance was violative of his right of free speech, but did not object to the instruction at the trial or assign it as error in either of the state appellate courts or the United States Supreme Court. Held: The ordinance, as construed by the trial court in its instruction to the jury, was violative of petitioner's constitutional right of free speech, even though he did not object to this interpretative instruction at any stage of the trial. *Terminiello v. City of Chicago,* 337 U. S. 1 (1949).[2]

In this decision the Supreme Court, for the first time in the history of the court, has reversed the decision of a state court for an error which it noticed of its own motion. Its failure to do so in the past has been because of the strict interpretation of the statute conferring jurisdiction on the court in reviewing state decisions.[3] Section 1257 of Title 28, United States Code, specifies the method of review of judgments of state courts. Clause 3 of this section[4] authorizes the court to review by certiorari decisions of state courts where "any title, right, privilege or immunity is *specailly set up or claimed* by either party" under the federal Constitution or laws of the United States.

In contrast to Section 1254,[5] which has been held to authorize the court on certiorari to a United States Court of Appeals to examine the whole case, regardless of

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[1]"All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city . . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense." Rev. Code, City of Chicago, c. 193, § 1 (1) (1939).

[2]Vinson, C. J., dissented on the ground that a reversal of the state court's decision because of an unobjected-to error did not accord with the principles followed by the Supreme Court in review of state decisions. Frankfurter, J., with whom Jackson, J., and Burton, J., concurred, dissented on the ground that the court had no power to reverse a decision of a state court on a point that was urged neither in the Supreme Court nor below, since as the state court had no opportunity to pass on the question it could not be deemed to have denied the constitutional right. Jackson, J., with whom Burton, J., concurred, dissented on the merits of the case in that when taken as a whole, under the circumstances of the case, the charge was not violative of petitioner's right of free speech.

[3]Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States § 57 (1936).

[4]"By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statute of, or commission held or authority exercised under, the United States."

[5]Clause 1 is as follows: "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

the character or number of questions involved,[6] Section 1257 has been interpreted to authorize review only of the federal questions which have been "properly presented" or "properly raised." The court's power of review is limited not only to the question whether a right guaranteed by the federal Constitution was denied,[7] but to the particular claims duly made below and denied.[8] The rule evolved from these cases, although it has not been expressly declared by the court, seems to be that in order for a question to be considered it must be such that if standing alone would confer jurisdiction on the court.[9]

In the instant case a federal question was raised and decided by the state court, although the opinion of the Illinois Supreme Court was to the contrary.[10] This being so, the federal Supreme Court had jurisdiction of the case.[11] Petitioner's only claim below was that as applied to him the ordinance was violative of his right of free speech: his argument in all courts was that his words did not constitute fighting words. But this contention was not considered by the court. Reversal was based on the ground that the ordinance as construed by the trial court was unconstitutional.

It has been held that the validity of the effect of a statute and the validity of the statute are separate questions, and if both are not raised below, only the one properly presented will be considered.[12] Moreover, in reviewing a state decision in which appellant made his claim on the wrong basis, the court said that it was powerless to help him, even though if the proper contention had been made it would have been sustained.[13]

In *Whitney v. California*[14] the defendant was convicted of violating a state statute prohibiting criminal syndicalism. Jurisdiction was reluctantly assumed by the Supreme Court on the certificate of the California District Court of Appeals that the question whether the act was repugnant to the due process and equal protection clauses of the Fourteenth Amendment.[15] The court considered only the questions set

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[6]Langnes v. Green, 282 U. S. 531 (1930); Wilborg v. United States, 163 U. S. 632 (1896); Clyatt v. United States, 197 U. S. 207 (1905).

[7]Murdock v. Memphis, 20 Wall. 590 (U. S. 1875); Montana *ex rel.* Haire v. Rice, 204 U. S. 291 (1907).

[8]Whitney v. California, 274 U. S. 357 (1927); Seaboard Airline Railroad Co. v. Watson, 287 U .S. 86 (1932); Seaboard Airline Railroad Co. v. Duvall, 225 U. S. 477 (1911); Wilson v. McNamee, 102 U. S. 572 (1881); Keokuck & H. Bridge Co. v. Illinois, 175 U. S. 626 (1900); Dewey v. Des Moines, 173 U. S. 193 (1899); Hamilton Mfg. Co. v. Mass., 6 Wall. 632 (U. S. 1868).

[9]See note, 63 L.D.A. 571 (1904).

[10]Terminiello v. City of Chicago, 400 Ill. 23, 79 N.E.2d 39 (1948).

[11]Whether a federal question was raised properly in the state court is itself a federal question, and the Supreme Court is not bound by the highest court of the state. Carter v. Texas, 177 U. S. 442 (1900); Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113 (1935); Seaboard Airline Railroad Co. v. Duvall, *supra* note 8.

[12]Wilson v. Cook, 327 U. S. 474 (1946).

[13]Whitney v. California, *supra* note 8. In Seaboard Airline Railroad Co. v. Watson, *supra* note 8, a Florida statute, which was conceded by the court to be violative of the due process clause, was upheld because appellant claimed only that the statute was violative of the equal protection clause. Appellant's assignment of error to the United States Supreme Court contained a reference to due process, in that it stated that the state court erred in holding that the statute did not deprive the appellant of its property without due process of law and of the equal protection of the law as guaranteed to it by Section 1 of the Fourteenth Amendment. The appeal was dismissed because the issue of due process had not been properly presented.

[14]274 U. S. 357 (1927).

[15]*Ibid* 361.

forth in the certificate and affirmed the conviction. In a separate concurring opinion by Justice Brandeis it was pointed out that the statute clearly abridged freedom of speech and assembly, and the evidence showed that there was no clear and present danger of any action which the state was entitled to protect. However, because the case was from a state court, the Supreme Court lacked the "power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court."[16]

It is submitted that if this decision is followed the interpretation of Section 1257 will have been enlarged. The wisdom of this encroachment on the sovereignty of the state courts in order to protect the right of a person to publicly denounce others because of their race and religion is to be doubted.

Francis B. Stevens

Civil Contempt—Counsel Fees Included as Part of Civil Relief for Violation of Injunction

Defendant's refusal to comply with order enjoining his operation of mink farm and horse slaughtering business resulted twice in contempt proceedings. Court awarded fine measured by plaintiffs' counsel fees, ordering same paid within ten days or defendant committed to prison until payment. *Held:* Inclusion of counsel fees was proper under statute,[1] and imprisonment to coerce payment was not unconstitutional. *Trotcky v. Van Sickle et al.,* 85 N.E.2d 638 (Ind. 1949).

The power of courts of law and chancery to enforce their decrees by contempt proceedings has long been recognized as essential to the effective administration of justice,[2] and the power to fine and imprison for contempt is regarded as a necessary incident and attribute of every court.[3] Without this power the court "could no more exist than without a judge."[4]

Distinction is drawn between the different types of contempt, criminal and civil, based upon the nature and purpose of the proceedings. The corrective measures applicable in any case depend on these differences.[5] Proceedings for civil contempt can result only in imprisonment to coerce obedience to the decree or a fine payable to the aggrieved party as compensation.[6]

This coercive power to imprison contemptuous parties, inherently possessed by the courts, is not in any way diminished or abolished by constitutional or statutory provisions prohibiting imprisonment for debt. A fine imposed for civil contempt is not a debt within the meaning of such provisions.[7] The imprisonment in such a case is not punishment.[8] The court bids the defendant pay the fine or suffer confinement; it is a means of coercing or compelling obedience to the order.[9]

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[16]*Ibid* 380.

[1]Ind. Stat. § 3-2115 (Burns 1946 Replacement): . . . The court shall take all necessary measures to indemnify the plaintiff against damages in the premises.

[2]Beale, *Contempt of Court,* 21 Harv. L. Rev. 161 (1908).

[3]4 Bl. Com. 286; Watson v. Williams, 36 Miss. 331 (1858); Ramsey v. Ramsey, 125 Miss. 185, 87 So. 491 (1921).

[4]Watson v. Williams, *supra* note 3.

[5]Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911).

[6]McClintock on Equity 37 (2d ed. 1948).

[7]12 Am. Jur. 432.

[8]Gompers v. Buck's Stove & Range Co., *supra* note 5; Ramsey v. Ramsey, *supra* note 3.

[9]Evans v. Evans, 193 Miss. 468, 9 So.2d 641 (1942); *In Re* Nevitt, 117 F. 448 (8th Cir. 1902).

As a general rule, it is true that each litigant is bound to bear the expense of his own counsel fees in the absence of a statute to the contrary.[10] Conflict among the authorities abounds over the question of awarding counsel fees to the successful party in contempt proceedings. They are allowed in some,[11] denied in others,[12] but the latter acknowledge the fact that the power to award counsel fees is purely statutory.[13] The instant case arose in Indiana, where remedies in contempt proceedings are prescribed by statute.[14] In order to "indemnify the plaintiffs against damages in the premises," the court had to permit them to recover expenses incurred in securing a compliance with the court's order. The present decision applies a fair and just construction of the statute by allowing counsel fees as damages.

Leon L. Porter, Jr.

Contracts—Revocation of Sub-bid by Sub-contractor—Evidence of Custom in Building Trade

Plaintiff, a general building contractor, having been invited to bid on a contract for the erection of a building in Louisiana, requested bids for the plastering work from sub-contractors. Defendant submitted a bid which was used by plaintiff in preparing its general bid. On August 10, the owner awarded the general contract to plaintiff. On August 19, defendant asked to withdraw his bid, but plaintiff refused permission. On August 27, the owner entered into a formal contract with plaintiff; on the same day plaintiff formally accepted defendant's bid and called upon him to perform. When defendant refused to perform, plaintiff sued for the difference between the price bid by the defendant and that of the substitute plasterer. Held: The evidence did not support the finding that it is the universal custom in the building trade to treat sub-contractor's bid as irrevocable after it has been used in the preparation of general contractor's bid unless sub-bid states to the contrary. Reversed and remanded. *Albert v. R. P. Farnsworth & Co.*, 176 F.2d 198 (5th Cir. 1949).

At common law, a custom cannot be looked to to change a rule of law,[1] or to create a contract.[2] Moreover, a custom, when relied upon to take the place of a settled principle of law, must be as definite and specific in negativing the principle as the law it assumes to supplant is in affirming it.[3] In the instant case, the court was of the opinion that the evidence as to custom was wholly wanting in the requisite certainty, generality, and reasonableness.

The instant case, by making the sub-contractor's offer revocable even after the general bid in which it has been used has been accepted by the owner, poses for the general contractor the problem of securing a dependable basis for the preparation of his bid. The weight of authority in common law jurisdictions is that an offer by a sub-contractor is revocable unless supported by a contract under seal or by considera-

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[10]20 C.J.S. 456.

[11]State v. Winbauer, 21 N.D. 70, 128 N.W. 679 (1910); Tribe v. Tribe, 59 Utah 112, 202 Pac. 213 (1921).

[12]O'Rourke v. Cleveland, 49 N.J.Eq. 577, 25 Atl. 367 (1892).

[13]*Id.* 25 Atl. at 368.

[14]*Supra* note 1.

[1]East Birmingham Land Co. v. Dennis, 85 Ala. 565, 5 So. 317 (1889).

[2]City Mortgage & Discount Co. v. Palatine Ins. Co., Limited, of London England, 226 Ala. 179, 145 So. 490 (1933); Fireman's Fund Ins. Co. v. Williams, 170 Miss. 199, 154 So. 545 (1934).

[3]Federal Reserve Bank v. Malloy, 264 U. S. 160 (1924).

tion.[4] This view has been the subject of some criticism.[5] In two recent decisions,[6] a different conclusion was reached under the Restatement's theory of "promissory estoppel."[7] Although this doctrine has ordinarily been applied only in charitable subscription cases, the mere fact that the transaction is commercial in nature will not preclude its use.[8] The basis of "promissory estoppel" is to avoid the harsh results of allowing the promissor in such a case to repudiate when the promisee has acted in reliance upon the promise.[9] Justifiable reliance and irreparable detriment to the promissee are factors necessary to enable the promisee to rely upon this rule.[10]

It is submitted that the instant case presents all the requisite factors. The promissee has acted in justifiable reliance on the promise and suffered detriment by the promisor's refusal to perform. Thus it appears that a more just decision could have been reached by resorting to the doctrine of "promissory estoppel."[11]

Here the sub-contractor sought to withdraw from his engagement because he made a mistake in offering to do the work for an unprofitable price. Such a defense should not be countenanced. The tendency is, and perhaps should be, to make the fields of law and ethics more nearly coextensive.[12]

Ancil L. Cox, Jr.

Contribution—Third Party Defendant Rule

Husband and wife were guest passengers in defendant's car when it collided with a cab belonging to plaintiff. Wife sued plaintiff who filed a third-party complaint against defendant alleging contributing or sole negligence. Defendant denied negligence claiming that wife's injuries were the result of plaintiff's negligence and also counterclaiming for his own injuries. Husband and wife did not amend their complaint to assert a claim against defendant. Held: The right to seek contribution belongs to the tortfeasor who has been forced to pay and does not depend on a selection of defendants by the plaintiff. *Knell v. Feltman,* 174 F.2d 662 (D.C. Cir. 1949).

The doctrine of no contribution between joint tortfeasors had its unfortunate beginning in 1799 when contribution was denied as between two wilful tortfeasors.[1]

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[4]James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2d Cir. 1933); see Restatement, Contracts § 35(e) (1932); 1 Williston, Contracts § 55 (Rev. ed. 1933).

[5]20 Va. L. Rev. 214 (1933); 28 Ill. L. Rev. 419 (1933).

[6]Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); Northwestern Engineering Co. v. Ellerman, 69 S. D. 397, 10 N.W.2d 879 (1943).

[7]Restatement, Contracts § 90 (1932): "A promise which the promisor reasonably expects to induce action or forebearance of a definite and substantial character on the part of the promisee and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise."

[8]Robert Gordon, Inc. v. Ingersoll-Rand Co., *supra* note 6.

[9]Siegal v. Spear & Co., 234 N. Y. 479, 138 N. E. 414 (1923). *Cf.* Allegheny College v. National Bank, 246 N. Y. 369, 159 N .E. 173 (1927).

[10]Robert Gordon Inc. v. Ingersoll-Rand Co., *supra* note 6.

[11]However, instead of invoking this rule, it seems that practically the same result could be reached under the Louisiana Civil Code. Article 1809 is susceptible of an interpretation which, while permitting revocation of offers, also protects the reliance interest of the offeree.

[12]Winfield, *The American Restatement of the Law of Contracts,* J. Comp. Leg. & Int'l. 179, 186 (1929): "On principles of common justice why should a promisee who has reasonably relied on a promise of this kind, and has acted upon it, be deprived of his remedy?"

[1]Merryweather v. Nixan, 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799) (in 1799 "tort" described only wilful wrongs).

The rule has been expanded to include mere negligent tortfeasors, joint and concurrent, and who are vicariously liable.[2] The apparent trend is away from the harshness of the strict rule;[3] however, Mississippi is still among that majority of states that will not allow action for contribution.[4] There are only four states that permit relief to such defendants without the specific aid of statutes.[5]

Reasons other than historical given in favor of the rule have been that courts will not aid a wrongdoer,[6] and that such denial is socially desirable, it being said that most contribution claims would arise from insurance companies.[7] The strongest argument against the present rule is that selection as between tortfeasors is left up to the plaintiff and such a procedure is an open invitation to collusion.[8] One highly successful instance of this comes from Ohio. Plaintiff recovered a joint and several judgment against two railroads; a third railroad paid the judgment and took an assignment from the judgment creditor. Subsequently the assignee bought up all the outstanding stock of one of the defendants, and then recovered the full amount of the judgment from the other defendant railroad.[9]

Under *Erie v. Tompkins*[10] neither the third-party defendant rule[11] nor the law of the principal case will alter the substantive rights and duties of joint tortfeasors in Mississippi. Rule 14(a) merely affords one defendant the rather vain opportunity of bringing in another and having their relative liability declared. The case is a good example of the application of Rule 14(a) and one of its intended functions; and also it is indicative of the trend toward removing from the plaintiff the control of the burden of the judgment.

Lester F. Sumners

Damages—Newspaper's Tort Liability for Erroneous Price Quotation in Advertisement—Duty of Merchant to Mitigate Loss

Publisher erred in advertising apparel at 50 per cent reduction when sale was to be at only 25 per cent off. He offered to correct error by means of front page story,

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[2]Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. of Pa. L. Rev. 130 (1932). Illinois Cent. R. R. Co. v. Clark, 85 Miss. 691, 38 So. 97 (1905) involved suit against conductor and railroad for wrongful death at hands of conductor; held for conductor and against railroad: ". . . The defendant against whom a verdict and judgment were rendered cannot complain that the jury failed to include in the verdict the other defendant."

[3]Prosser on Torts 1117 (1941): "It seems inevitable that in due course of time the pressure of opinion will compel the abolition of the rule denying contribution in favor of negligent tortfeasors. As to wilful wrongdoers . . . there is no indication of any desire or tendency to relax the original English rule."

[4]Thomas v. Rounds, 161 Miss. 713, 137 So. 894 (1931); Miss. Cent. R. R. Co. v. Roberts, 173 Miss. 487, 160 So. 604 (1935).

[5]Leflar, *supra* note 2, at 141.

[6]*Contra:* Eureka Coal Co. v. Louisville & N.R.R. Co., 219 Ala. 286, 122 So. 169 (1929), ". . . In such cases there is no room or reason for the application of the principle that courts will not lend assistance on an immoral or illegal act. . . ."

[7]54 Harv. L. Rev. 1156 (1941).

[8]Leflar, *supra* note 2, at 137: "It is common knowledge that such undercover dealings occur constantly in personal injury cases involving joint tortfeasors, though affirmative record of them seldom appears in the reported decisions."

[9]Pennsylvania Co. v. Western Penn. Rys. Co., 110 Ohio St. 516, 144 N.E. 51 (1924).

[10]304 U.S. 64 (1938).

[11]Fed. R. Civ. P. 14 (a).

window signs, etc. Merchant alleged that calling off the sale would ruin his business and that publisher agreed on this point. Sale was continued for the advertised period and merchant brought action in tort for publisher's negligence to recover damages. HELD: Evidence sufficiently supported the finding of negligence by publisher and its liability; but whether merchant had duty under these circumstances to mitigate his damages by any reasonably available means was issue of fact for jury on question of amount of damages. Affirmed on liability and remanded on issue of damages alone. *Meridian Star v. Kay's,* 41 So.2d 30, *suggestion of error overruled,* 41 So.2d 746 (Miss. 1949).

A cause of action grounded on negligence is predicated on the elements of duty, breach ("negligence," or failure to use due care), and injury as a proximate result of the breach.[1] As one of the most recent in a surprisingly short list of damage cases of this nature against newspapers, the instant one serves to undermine the early English rule that there is no such thing as liability for negligence in word as distinguished from act.[2] This is not to say, however, that the few attacks which have been made upon the doctrine have been successful for the litigants. On the contrary, even in the most trying circumstances of injury,[3] the courts have carefully restricted liability to those situations in which the courts can, or will, determine a "duty."[4] In a more reasonable set of circumstances, it was held that a ticker service company was not liable to a member of the general public for its erroneous news reports,[5] that decision being grounded on the theory that a ticker service company's obligations to the public depended upon a privity of relationship. In another recent case, plaintiff alleged she suffered severe injury through use of a formula for dandruff remover, negligently recommended as a reliable remedy in one of the defendant's feature stories.[6] Again, the complaint was dismissed for failure to state a cause of action. Plaintiffs in the instant case charged that "as a direct and proximate result of defendant's negligence and carelessness . . . they were damaged." But the court desired to consider the plaintiff's own election to proceed with the sale, saying: "the fact that he did so elect to proceed, and the asserted justification therefor (an affront to his integrity and unfavorable customer reaction), are the crux of our review." Had the instant case been grounded on contract rather than tort, it is reasonable to believe that the court would have found less difficulty, for here there appears to be a definite "privity" relationship between the advertiser and the publisher.

Unfortunately, no rule of thumb as to liability of a publisher can be drawn from even these cases. In the ticker service case,[7] the court conceded that "a different rule might be adopted" but, there being no privity between the plaintiff and the de-

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[1]McAndrews v. Chicago, L.S. & E. Ry. 222 Ill. 232, 78 N.E. 603 (1906).

[2]POLLOCK ON TORTS 302 (13th ed. 1929); Fish v. Kelly, 17 C.B.N.S. 194, 144 Eng. Rep. 78 (1864). *But see* Burroes v. Lock, 10 Ves. 471, 32 Eng. Rep. 927 (1805); Slim v. Croucher, 1 De G.F. & J. 518, 45 Eng. Rep. 462 (1860).

[3]Curry v. Journal Publishing Co., 41 N.M. 318, 68 P.2d 168 (1937) (Plaintiff alleged that reading an Associated Press dispatch erroneously reporting the death of his distinguished father had caused him a heart attack, and severe nervous shock. Plaintiff's wife also sought to recover for her miscarriage, and prenatal injury to child caused by the shock of reading about her father-in-law's death. Demurrer to declaration sustained, and on appeal affirmed).

[4]The theory of duty was considered ably by the late Chief Justice Cardozo in Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N.E. 99 (1928).

[5]Jaillet v. Cashman, 115 Misc. 383, 189 N.Y. Supp. 743 (1921), *aff'd,* 235 N.Y. 511, 139 N.E. 714 (1923).

[6]MacKown v. Ill. Pub. & Print. Co., 289 Ill. App. 59, 6 N.E.2d 526 (1927).

[7]*Supra* note 5.

fendant, pointed out that "the law does not attempt to impose liability for a violation of the duty (*i.e.*, to say nothing that is not true) unless it constitutes a breach of contract, obligation or trust, or amounts to a deceit, libel, or slander." And in another case of somewhat similar circumstances,[8] Justice Pound reiterated the limited liability basis, saying, "negligent words are not actionable unless they are uttered directly with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some relation of duty, arising out of public calling, contract or otherwise, to act with care if he acts at all."[9] Obviously, the newspaper in the instant case may be assumed to have had notice that the words of the ad would be acted on; and there could not only be found a relation of duty arising out of public calling but out of contract as well.

Some of the errors of newspaper reporting can perhaps be explained by the very speed necessary in newspaper reporting;[10] but in cases such as the instant one, speed is not an essential. The advertising copy is frequently submitted to the publisher several weeks prior to the date designated for its publication. This fact, consequently, removes the explanation of speed from the practical defenses available to newspaper publishers in regard to advertising errors.

Moreover, the possibility of danger existing in too widespread a newspaper liability doctrine and the understandable reluctance with which it is extended should not be particularly persuasive in such cases, especially where the negligent mis-statement has caused a provable injury. Here, the court said, "The evidence sufficiently supports the finding of error and mistake by the appellant and its liability." It is perhaps because of this fact that the court in the instant case held that the liability was properly determined. In addition, it is submitted that the ultimate decision (as to liability) appears to be in complete harmony with the qualifications and limitations suggested by Cardozo[11] and Pound.[12] It extends no further than the liability of newspapers to their advertisers for negligence in printing advertisements. And the damages are limited to those which the plaintiff reasonably could not prevent.[13] The danger in this doctrine is in the comparatively unlimited discretion the jury will have in determining what are reasonable steps in mitigation of damages. At any rate, the case seems to be one of first impression and an important extension of newspaper liability for negligent publication of erroneous advertisements.

Frederick Perry Hamel

Landlord and Tenant—Tenant at Sufferance as Affected by Emergency Price Control Act—Double Rent Statutes Exacting Penalty or Rent

Landlord obtained a certificate from the area director of the United States Office of Price Administration which stated, "This certificate only authorizes an action to

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[8]Courteen Seed Co. v. Hong Kong & S. B. Corp., 245 N.Y. 377, 157 N.E. 272 (1927).

[9]Quoted with approval by Cardozo in Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

[10]Charnley, *A Study of Newspaper Accuracy*, 13 Journalism Q. 394 (1934) (This study disclosed an amazing number of errors in straight news items, 340 appearing in 450 stories published by three Minnesota daily papers).

[11]*Supra* note 9.

[12]*Supra* note 8.

[13]The court posed the following question for the determination of the jury: "Was the situation here such as to justify Kay's in electing to suffer a maximum loss, and was his decision final and controlling?"

be brought for the eviction or removal of the tenant instituted in accordance with the requirements of local law. . . ." Thereafter, notice to quit was given the tenant pursuant to the requirements of the certificate, and after expiration of the required time an action was brought and tenant evicted, together with judgment for double rent under the state's statute.[1] HELD: The additional burden imposed by the statute is a permissible penalty and not rent. Authorization by the OPA to proceed under the local law lifted pre-existing barriers to the eviction of the tenant after due notice. After that the tenant is chargeable not for his occupancy but for his obstinancy. *Stovall v. Gardner,* 203 Miss. 527, 36 So.2d 163 (1948).

The cases are susceptible of division into three classes with regard to treatment of the exaction as rent on the one hand and penalty or damages on the other. One class bars recovery on the ground that the exaction is rent. Under the Emergency Price Control Act,[2] no recovery is permissible above the amount of monthly rent reserved, because it is said that the federal law must take precedence over the state law.[3]

The second group, to which the principal case belongs, treats the exaction as penalty or damages, and allows recovery. The penalty for withholding possession of property is not rent, but is in fact damages, and rent control regulations have no application to an award of damages for unlawfully withholding property.[4]

The third group of cases refuses recovery of the excess amount whether it be called penalty or damages. The principle deducible from these decisions is that the laws of Congress were intended to prevent any exaction from the tenant above the rent as frozen or approved by the OPA, even though it be classified as a penalty.[5]

In most of the cases refusing recovery, no certificate authorizing eviction was obtained from the OPA. In a Missouri case[6] where a certificate was obtained, the court indicated that the local statute providing for double rent was superseded by the federal laws and that a landlord was forbidden to receive rent over and above the maximum rent as fixed by the price administrator. This was dictum, however, since the court was merely explaining the action of the lower court in awarding single rent. The question of single or double rent was not raised on appeal. Nevertheless, the case was cited for that proposition in a later decision by the same court and may state the rule in that jurisdiction.[7]

The apparent confusion can be removed by considering the tenant holding over without consent as a tenant at sufferance. At common law the status of a tenant holding over after the expiration of his term was within the control of the landlord, who might treat his continuing occupancy as a trespass or as an offer to rent for another term.[8] If the landlord elected to treat the tenant holding over as a tres-

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[1]MISS. CODE § 657 (1942).

[2]56 STAT. 23 (1942), 50 U.S.C.A. App. § 901 *et. seq.*, as amended, 50 U.S.C.A. App. § 1891 *et. seq.* (Supp. 1950).

[3]Matowsky v. Katz, 184 Misc. 60, 53 N.Y.S.2d 430 (N.Y. Munic. Ct. 1945).

[4]Haig v. Hogan, 82 Cal. App. 2d 876, 187 P.2d 426 (1947).

[5]Ricci v. Claire, 21 N.J. Misc. 266, 33 A.2d 591 (1943); McGuinn v. McLain, 225 N.C. 750, 36 S.E.2d 377 (1945).

[6]F. A. Sanders Real Estate & Inv. Co. v. Becker, 202 S.W.2d 549 (Mo. App. 1947).

[7]Lucas Hunt Village Co. v. Klein, 218 S.W.2d 595 (Mo. 1949).

[8]Coleman v. Brigham, 115 Conn. 286, 161 Atl. 236 (1932); Conway v. Starkweather, 1 Denio 113 (N.Y. 1845); Condon v. Brockway, 157 Ill. 90, 41 N.E. 634 (1895).

passer, where possession was unlawfully withheld, damages were recoverable against the wrongdoer. This *measure* has been held to be the reasonable rental value of the premises for the duration of such wrongful possession.[9] The rent reserved in a lease should not be considered as fixing or determining the amount of damages, but may be considered in determining the same.[10] Rent could not be collected as rent, but was merely one of the proper elements to be considered in fixing the amount of damages.[11]

Some states, rather than leave the determination of damages to discretion, fixed this amount at "double the rent which he should otherwise have paid."[12] It should be noted that the Mississippi "double rent" statute was construed to be penal prior to the passage of the EPCA.[13]

The federal laws, known as the EPCA and its amendments, did not entirely supersede local law but only modified it as to when a tenant may be treated as a trespasser, thus making inoperative the double rent statutes. It is within the discretion of the housing expediter[14] to grant the power of election to the landlord, and when the housing expediter authorizes the landlord to bring an action for eviction in accordance with local law, such power has been granted.

Roger B. Shows

Negligence—Directing Verdict for Defendant in F.E.L.A. Cases

Railroad's employee brought action under Federal Employers' Liability Act[1] to recover for injuries sustained after slipping on a greasy board and falling into a "wheel pit." Defendant railroad had erected safety chains around pit to prevent such accidents. Evidence showed that plaintiff had to squeeze past chain post in order to reach board from which he fell, and that he knew that chains were there to keep him from crossing pit. There was conflicting testimony as to whether other employees used the board as a walkway. In attempting to prove railroad's negligence, plaintiff was met with directed verdict for defendant in trial court. Held: There was sufficient evidence of negligence to send case to jury. *Wilkerson v. McCarthy*, 336 U.S. 53 (1949).

What "test" should the trial court use in determining whether to direct a verdict for the employer or to send the case to the jury in cases under the F.E.L.A.? Justice Reed said, in *Brady v. Southern Railway Company*,[2] that the "weight of evidence under the Employer's Liability Act must be more than a *scintilla*[3] before the

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[9]Schrunk v. Andres, 221 Minn. 465, 22 N.W.2d 548 (1946).

[10]Denecke v. Miller & Son, 142 Iowa 486, 119 N.W. 380 (1909).

[11]Gibbs v. Didier, 125 Md. 486, 94 Atl. 100 (1915).

[12]Miss. Code § 947 (1942). See McGuinn v. McLain, *supra* note 4 (The rent ceiling as set by the OPA is the measure of damages).

[13]Gulley v. Mayo, 191 Miss. 143, 1 So.2d 800 (1941). See 2 Tiffany, Landlord & Tenant 1498 (1912) (Statutes of this character have been regarded as penal).

[14]The title of the administrator of the Housing and Rent Control Act, *supra* note 2.

[1]45 U.S.C.A. § § 51 - 60.

[2]320 U.S. 476 (1943).

[3]See 9 Wigmore, Evidence § 2494 (3d ed. 1940) for a discussion of the scintilla and other tests to be used in deciding whether or not to send an issue of possible negligence to the jury.

case may be properly left to the discretion" of the jury. In several cases[4] during the last ten years the Supreme Court of the United States has said that "the fact that fair-minded men might reach different conclusions" from the evidence is the "test" to be used. The conclusion to be drawn from these cases, and like cases during the same period, would seem to be that, if there is a reasonable inference of negligence to be drawn from the evidence, the case should go to the jury.

On the other hand, in *Wilkerson v. McCarthy* the Court seemed to some extent to overthrow what it had said in earlier cases. Justice Black pointed out that "peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fair minded men might draw different inferences,'" and he added that if there is left "only a very narrow conflict in the evidence, it (is) for the jury, not the court, to resolve the conflict."[5]

Although this decision seems to be in conflict with what the Supreme Court has said in previous cases, there are many who insist that the case only puts into words a rule laid down by the Court by its actions in previous cases.[6] One need look only to a statistical analysis of cases on this point since the 1939 amendment[7] to the F. E. L.A. to see the reason for such beliefs.[8] It may have been such actions as these which led the Court of Appeals for the Seventh Circuit to the conclusion "that the Supreme Court has in effect converted this negligence statute into a compensation law thereby making, for all practical purposes, a railroad an insurer of its employees . . . it is difficult to conceive of a case brought under this act where the trial court would be justified in directing a verdict."[9] An appeal was taken from this decision and the Supreme Court denied certiorari.[10] However, in referring to this case, the Court in the instant decision reiterated that negligence was still the basis for recovery.

Further light is shed on the "test" to be used by such statements as: "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take

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[4]Bailey v. Central Vermont Ry., Inc., 319 U.S. 350 (1943); Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 (1943); Ellis v. Union Pac. R. Co., 329 U.S. 649 (1947).

[5]The "very narrow conflict" referred to by Justice Black concerns the testimony as to whether other employees used the board across the "wheel pit."

[6]See the dissent of Justice Jackson in Wilkerson v. McCarthy; the dissent of Justices Roberts and Frankfurter in Bailey v. Central Vermont Ry., Inc., *supra* note 4; majority opinion in Griswold v. Gardner, 155 F.2d 333 (7th Cir. 1946).

[7]53 STAT. 1404 (1939), 45 U.S.C. § § 51, 54, 56, 60 (1940). The amendment prohibited the employer using assumption of risk as a defense.

[8]Cases appealed to Supreme Court at instance of employees 33
Certiorari granted 20
Judgment favorable to employee 17
Judgment favorable to employer 3
Certiorari denied 13
Cases appealed to Supreme Court at instance of employers 22
Certiorari granted 0
Certiorari denied 22
These statistics were compiled by the writer from the list of cases in the Appendix to Wilderson v. McCarthy, 336 U.S. 53 (1949) plus the case of Bailey v. Central Vermont Ry., Inc., *supra* note 4. It should be noted that certiorari was granted in Bruner v. McCarthy, 322 U.S. 718 (1944), but later dismissed, 323 U.S. 673 (1944), "as improvidently granted."

[9]Griswold v. Gardner, *supra* note 6.

[10]Gardner v. Griswold, 329 U.S. 725 (1946).

away a goodly portion of the relief which Congress has offered them."[11] "It appears to be the clear Congressional intent that to the maximum extent proper, questions in actions arising under the Act should be left to the jury."[12] "Once there is a reasonable basis in the record for the conclusion that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion."[13] "The historic role of the jury . . . is being restored in this important class of cases."[14] "The (F.E.L.A.) was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."[15]

Thus, it would seem that the words of *Wilkerson v. McCarthy* and the Court's actions in preceding cases indicate that the "test" to be used must be one which will construe the facts as to possible negligence most strongly against the employer.

It has been said that in view of this decision a "workmen's compensation act is neither necessary nor desirable. If our Federal Supreme Court will consistently enforce the McCarthy case railroads will spend more money to prevent accidents, and both sides want accident prevention more than accident litigation."[16] But will the Supreme Court "consistently enforce" its decision in *Wilkerson v. McCarthy?* Justices Black, Douglas, Murphy, and Rutledge fought hard and long to attain this decision.[17] Two of these men no longer sit on the Supreme Court. In view of the fact that Justice Frankfurter, followed by Burton in *Wilkerson v. McCarthy,* has consistently opposed granting certiorari in these cases,[18] and that Justice Jackson is opposed to the "judicial legislation" on this question,[19] it may well be that the replacement of Justices Murphy and Rutledge will change the view of the Court on this particular question. Since Justices Clark and Minton have participated in no decisions on this point, the question is one which only time can answer.

Tom Crews.

Oil and Gas—Torts—Liability for Damages to Adjoining Land by Shooting Test Wells

Defendant shot three test wells on land where it had a right to make such tests. Three shots of explosives, consisting of ten to fifteen pounds of dynamite or other explosives, were used in each hole. Immediately thereafter, plaintiff's two water wells, located on adjoining land some 600-700 feet from the test wells, caved in, sanded up and ceased to produce water. The lower court found liability on the doctrine of res ipsa loquitur. Held: The facts were insufficient to establish liability under the res ipsa rule, in the absence of any evidence as to the usual standard of care in such operations. *Stanolind Oil & Gas Co. v. Lambert,* 222 S.W.2d 125 (Tex. Civ. App. 1949).

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[11]Justice Douglas in Bailey v. Central Vermont Ry., Inc., *supra* note 4.
[12]Justice Black in Tiller v. Atlantic Coast Line R. Co., *supra* note 4.
[13]Justice Douglas in Ellis v. Union Pac. R. Co., *supra* note 4.
[14]Justice Douglas in Wilkerson v. McCarthy.
[15]*Ibid.*
[16]3 N.A.C.C.A. Law Journal 198 (1949).
[17]See the majority opinions in: Bailey v. Central Vermont Ry., Inc., *supra* note 4; Tiller v. Atlantic Coast Line R. Co., *supra* note 4; Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29 (1944); Blair v. Baltimore & O. R. Co., 323 U.S. 600 (1945); Lavender v. Kurn, 327 U.S. 645 (1946); Jesionowske v. Boston & M. R. Co., 329 U.S. 452 (1947); Ellis v. Union Pac. R. Co., *supra* note 4; Wilkerson v. McCarthy.
[18]Tiller v. Atlantic Coast Line R. Co., *supra* note 4; Lillie v. Thompson, 332 U. S. 459 (1947); Anderson v. Atchison, T. & S. F. R. Co., 333 U.S. 821 (1948); Coray v. Southern Pac. Co., 335 U.S. 520 (1949); Wilkerson v. McCarthy.
[19]See Justice Jackson's dissent in Wilkerson v. McCarthy.

Where defendant conducts blasting operations on the land of plaintiff, the courts are in substantial agreement as to defendant's liability for resulting injuries. If the defendant is a trespasser, it is almost unanimously held that he is liable for all injuries that result from the blasting, regardless of negligence.[1] Where defendant goes on the land of plaintiff with permission to conduct blasting operations, as lessee or licensee, it is usually held that negligence must be proved to establish liability.[2] Where defendant went on plaintiff's land with a limited license to shoot test wells, but exceeded his license, it was held in a recent Mississippi case that the defendant became a trespasser ab initio, and was liable without regard to negligence, although in a dictum negligence was said to be present.[3]

Where, however, the blasting operations are conducted, not upon the plaintiff's land, but on adjoining land where defendant has a right to blast, there is much conflict and uncertainty. If there is a technical trespass, such as the throwing of rocks and debris on the land of the plaintiff, most courts follow to some extent the dangerous instrumentality doctrine of strict liability.[4] A few courts require proof of negligence even though there is such a trespass, and Texas is in this minority, having expressly repudiated, in another factual situation, the dangerous instrumentality doctrine of *Fletcher v. Rylands*.[5] This exact point has never been presented to the Mississippi courts.

Where there is no technical trespass, such as the throwing of rocks or dirt on the land of plaintiff, and all damages are due solely from the concussion, there is further conflict in the cases. About half of the courts require some showing of negligence,[6] while others hold the defendant to be strictly liable for all injuries that result from the blast.[7] The question of strict liability for blasting has never been decided in Mississippi.

It should be noted that many of the cases that found strict liability did so where the blasting was in thickly populated areas, and that where the blasting is in rural areas, the courts are more prone to require proof of negligence. Furthermore, many jurisdictions which reject the doctrine of strict liability accomplish approximately the same results on the nuisance theory.[8]

In jurisdictions which require a showing of negligence, the doctrine of res ipsa loquitor may sometimes be invoked, but it seems of little practical value. Although the Texas court does not say that the doctrine will never be applied, it states in the principal case that "There seems to be no Texas case in which the doctrine of res ipsa loquitur has been held to support a judgment in a case involving the use of explosives and resulting damages to real property." The court further says that the doctrine could be used under proper facts, and seems to imply that it could have been relied on if a standard of care in conducting such operations had been established. In an earlier and very similar case, where blasting ruined the plaintiff's well, the Texas court held that res ipsa loquitur did not apply because of the pleadings; however, departure from the usual standard of care was proved and negligence

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[1]4SUMMERS OIL & GAS 55 (Perm. ed. 1938).
[2]35 C.J.S. 240.
[3]General Geophysical Co. v. Brown, 205 Miss. 189, 38 So.2d 703 (1949).
[4]35 C.J.S. 238.
[5]Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936).
[6]Williams v. Codell Construction Co., 253 Ky. 166, 69 S.W.2d 20 (1934).
[7]See Note, 92 A.L.R. 741 (1934).
[8]PROSSER ON TORTS 451 (1941).

found.[9] In other cases, the Texas courts have refused to apply the doctrine of res ipsa loquitur where an oil well blew out and deposited mud and sand on plaintiff's land;[10] where a cistern was damaged by the shooting of a test well,[11] the court holding that negligence must be alleged and proved; where oil escaped from lessee's storage tank and was drunk by lessor's cattle;[12] and where salt water escaped from pools and went on plaintiff's land to cause damage.[13]

The res ipsa rule has never been invoked in a blasting situation in Mississippi. In fact, there are only twelve Mississippi cases digested under it, and therefore many questions relating to the doctrine have never been answered by this court. Two principles, however, seem to be well settled. First, specific negligence may be alleged, and the doctrine invoked, where otherwise applicable, to prove it.[14] There is much authority contra, holding that the doctrine has no application where the pleadings allege specific acts of negligence.[15]

'Second, most courts, including Texas, hold that where the res ipsa rule is used, it merely justifies the drawing of an inference of negligence, and does not create a presumption of negligence so as to require a finding of it in the absence of explanation by the defendant.[16] These courts say that res ipsa loquitur is merely one form of circumstantial evidence, from which the jury may permissibly draw an inference of negligence. Although this view had been expressed as dictum in earlier cases,[17] the Mississippi Supreme Court in a recent decision[18] abandoned this view, and held that the plaintiff is entitled to an instruction that where he has introduced facts sufficient to invoke the res ipsa rule, there is a duty on the defendant to make explanation. Thus in Mississippi, res ipsa loquitur, where applicable, is more than circumstantial evidence. It creates a presumption that requires explanation by the defendant, and if unexplained, results in a prima facie case.

Thus in bringing an action in Mississippi for damages to adjoining land by defendant's shooting of test wells, the plaintiff might urge the doctrine of strict liability, advance the nuisance theory, allege general and specific negligence, and if necessary, invoke the doctrine of res ipsa loquitur to establish negligence.

Fred M. Bush, Jr.

Physicians and Surgeons—Evidence—Expert Testimony Not Required to Hold Physician Liable for Malpractice

About 24 hours after a cystocopic examination had been completed by defendant, an infection developed in plaintiff's genito-urinary system. Evidence tended to show that immediately prior to the examination plaintiff's system had been free from infection. There was no direct evidence that the instruments used were or were not

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[9]Universal Atlas Cement Co. v. Oswald, 138 Tex. 159, 157 S.W.2d 636 (1941).
[10]Simmons v. Perkins 193 S.W.2d 737 (Texas 1942).
[11]Indian Territory Illuminating Co. v. Rainwater, 140 S.W.2d 491 (Texas 1940).
[12]Carter v. Simmons, 178 S.W.2d 743 (Texas 1944).
[13]Turner v. Big Lake Oil Co., *supra* note 5.
[14]Aponaug Mfg. Co. v. Carroll, 183 Miss. 793, 184 So. 63 (1938).
[15]Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944). See Note, 160 A.L.R. 1450 (1946).
[16]Wichita Falls Traction Co. v. Elliot, 125 Tex. 248, 81 S.W.2d 659 (1935); Holley v. Purity Baking Co., 128 W. Va. 531, 37 S.E.2d 729 (1946).
[17]Waddle v. Sutherland, 156 Miss. 540, 126 So. 201 (1930); J. C. Penney Co. v. Evans, 172 Miss. 900, 160 So. 779 (1935).
[18]Block v. Brown, 201 Miss. 653, 29 So.2d 665 (1947).

sterilized, but a physician testified that the introduction of the bacteria was evidently due to the use of defective instruments or else that the patient's body was not thoroughly cleansed. However, there was no expert testimony that the conduct of defendant was negligent or in conflict with the degree of care and skill ordinarily exercised by physicians in that vicinity. HELD: It was erroneous for the trial court to refuse to instruct the jury that they may infer negligence, without expert testimony, when it is common knowledge that what has happened to or developed in a patient is such that ordinarily does not occur in the absence of negligence on the part of the physician. *Moore v. Belt,* 203 P.2d 22 (Calif. 1949).

In order to recover damages from a physician or surgeon for want of proper care and skill, the plaintiff must show both that the defendant was unskillful or negligent and that injury was produced by his want of skill or care.[1] A physician's duty is to exercise such reasonable care, diligence, and skill as physicians and surgeons in the same general neighborhood and line of practice ordinarily have and exercise in a like case,[2] considering also the state of the medical profession at the time.[3] The determination of what is reasonable care is generally dependent upon testimony established by medical experts.[4] The layman is unable to understand the medical problems involved and is therefore unqualified to infer negligence without expert testimony.

As there is frequently an inadequacy of expert testimony because of the difficulty in getting a doctor to testify against a fellow practitioner in good standing, two possibilities are now available to the plaintiff in a malpractice action: (1) Those instances involving matters within the comprehension of laymen from which negligence may be inferred by them without expert testimony; and (2) those cases where the doctrine of res ipsa loquitur can be applied.

The requirement of expert testimony applies only to such facts as are peculiarly within the knowledge of medical experts and not to facts which may be ascertained by the ordinary use of the senses of a nonexpert.[5] In Mississippi, an instruction limiting the jury, in determining the negligence of a physician administering X-ray treatment, to testimony of experts was held erroneous.[6]

The doctrine of res ipsa loquitur is applied where an unusual injury occurs, or an injury to a part of the body not treated. Included in the first class are those cases where foreign matter is left in the wound and the burden of proving the exercise of due care passes to the physician.[7] The rule has also been applied to burns caused by X-rays.[8] An illustration of the second group exsits where the patient in an appendectomy received an injury to his arm, a part of the body not treated.[9]

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[1]Ewing v. Goode, 78 Fed. 442 (C.C. Ohio 1897).
[2]Sellers v. Noah, 209 Ala. 103, 95 So. 167 (1923).
[3]McCandless v. McWha, 22 Pa. 261 (1853).
[4]Ewing v. Goode, *supra* note 1; 7 WIGMORE, EVIDENCE § 2090 (3d ed. 1940).
[5]Barham v. Widing, 210 Calif. 206, 291 Pac. 173 (1930). For a general line of cases in regard to the necessity of expert testimony see 10 TEMP. L. Q. 220, 221 (1936); See Note, 141 A.L.R. 5 (1942).
[6]Waddle v. Sutherland, 156 Miss. 540, 126 So. 201 (1930).
[7]Saucier v. Ross, 112 Miss. 306, 73 So. 49 (1916) (leaving of a four inch rubber tube in patient's body); Prewett v. Philpot, 142 Miss. 704, 107 So. 880 (1926) (leaving open window during operation whereby bugs got into wound).
[8]Waddle v. Sutherland, *supra* note 6.
[9]Ybarra v. Spangard, 25 Calif.2d 486, 154 P.2d 687 (1944). For a comment on this case and of the application of the res ipsa loquitur doctrine see 40 ILL. L. REV. 421 (1946).

In Mississippi, the res ipsa loquitur doctrine requires that the instrumentality causing the injury must be in the control of the defendant, the injured person is without fault, and the injury is such as does not ordinarily occur if the one having control uses proper care.[10] It is a form of circumstantial evidence from which negligence may be inferred and which the jury is permitted but not compelled to accept,[11] and is used with caution.[12] It was not applied even where the treatment was customarily successful, as in the case of a child's death shortly after tonsillectomy, because there was not expert testimony establishing negligence.[13]

If it is proved by expert testimony that an unsterile instrument has been used upon a part of the body which becomes infected after the operation, a layman may infer negligence in its use. However, even though a recovery may have been socially desirable under the facts in the instant case, nevertheless it would seem that a lay juror is not qualified to infer negligence merely by proof of an unexplained infection.

Taylor Webb

Statutes—Interpretation—Rule of Ejusdem Generis—Federal Obscenity Statute

Appellant was convicted of knowingly depositing with a railway express agency, for carriage in interstate commerce, certain obscene phonograph records. The prosecution was based on the provisions of 18 U.S.C. § 1462 (1948) which make it a criminal offense to ". . . deposit . . . with any express company . . . for carriage from one state . . . to any other state . . . any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of an indecent character, ..." Held:[1] Obscene phonograph records[2] are not to be included in the prohibitions of the statute because certain classes of obscene matter are included specifically and phonograph records are not. *Alpers v. United States,* 175 F.2d 137 (9th Cir. 1949).

The canon of construction relied on by the court, *ejusdem generis,* is a rule that general words, in this case "or other matter of an indecent character", following designated particular things will be construed to include only those persons or things of the same class or general nature as those specifically enumerated.[3] The rule, however, does not necessarily require that a general provision be limited in its scope to the identical things named.[4] Nor does it apply when the context manifests a contrary intention,[5] or where the specific words used exhaust all of the subjects of the

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[10]Sanders v. Smith, 200 Miss. 551, 27 So.2d 889 (1946).

[11]Waddle v. Sutherland, *supra* note 6.

[12]J. C. Penny Company v. Evans, 172 Miss. 900, 160 So. 779 (1935).

[13]Sanders v. Smith, *supra* note 10.

[1]The court ruled out the government's contention that phonograph records are "prints".

[2]There was no question as to the obscene character of the records.

[3]Factor v. Laubenheimer, 290 U.S. 276 (1933); United States v. Certain Lands, 12 F. Supp. 345 (E.D. Mich 1935); Anderson v. Hattiesburg, 131 Miss. 216, 94 So. 163 (1922); Crawford, The Construction of Statutes 326 (1940); Lenhoff on Legislation 876 (1949).

[4]Children's Bootery v. Sutker, 91 Fla. 60, 107 So. 345 (1926).

[5]State v. McGillic, 25 N.D. 27, 141 N.W. 82 (1913); State v. Grosvenor, 149 Tenn. 158, 258 S.W. 140 (1924); Gauley Coal Co. v. Koontz, 77 W. Va. 583, 87 S.E. 930 (1916).

class mentioned.[6] Under these circumstances, the general words must have a different meaning from that of the specific words or be meaningless.[7]

The court held that the statute applied only to visual representation. Yet it would seem that the words "book, pamphlet, picture, motion picture film, paper, letter, writing, print" so completely exhaust the means of visual representation as to make the general term "or other matter of an indecent character" virtually useless and mere surplusage under the court's interpretation. It cannot be presumed that Congress used such a term without intending that it have a meaning and a use.

The context of the statute must be examined, and if the legislative intent can be ascertained from it, the rule of *ejusdem generis* or any other principle of interpretation should not be used.[8] To do otherwise would be to make legislative intent subordinate to a rule of construction.[9] The federal obscenity statutes[10] were intended to suppress the dissemination of immoral articles and obscene literature and should be so construed.[11]

This fact is made more apparent from the new edition of the United States Code[12] in which all of the obscenity statutes[13] are included in the same chapter, which is entitled "Obscenity." The act under consideration prohibits depositing with an express agency, in addition to those things mentioned before, "any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use". From the grammatical construction of the sentence, it would appear that the statute prohibits depositing with any express agency for interstate transportation ". . . any . . . article or thing designed, adapted, or intended . . . for any indecent or immoral use". Another obscenity act prohibits the mailing of any "letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device or substance."[14] This would seem to prohibit the mailing of obscene phonograph records. It is apparent from a reading of these

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[6]United States v. Mescal, 215 U.S. 26 (1909); CRAWFORD, THE CONSTRUCTION OF STATUTES 328 (1940); LENHOFF ON LEGISLATION 887 (1940).

[7]Mason v. United States, 260 U.S. 26 (1909); Gates v. Chandler, 174 Miss. 815, 165 So. 442 (1936).

[8]Mason v. United States, *supra* note 7; Gooch v. United States, 297 U.S. 124 (1936); United States v. Gallagher & Aschner, 12 Ct. Cust. Ap. 472 (1926); CRAWFORD, THE CONSTRUCTION OF STATUTES 245 (1940); LENHOFF ON LEGISLATION 876 (1949).

[9]Mason v. United States, *supra* note 7; Texas v. United States, 292 U.S. 22 (1933); Osaka v. United States, 84 F.2d 482 (5th Cir. 1936), *aff'd*, 300 U.S. 98 (1937); City of Philadelphia v. Standard Oil Co., 12 F. Supp. 647 (E.D. Pa. 1934), *aff'd*, 79 F.2d 764 (3d Cir. 1935); Grosjean v. American Paint Works, 181 La. 682, 160 So. 449 (1935).

[10]"Mailing of Obscene Articles," 35 STAT. 1429 (1909), 36 STAT. 1339 (1911), 18 U.S.C. § 1461 (1948); "Importation and Transportation of Obscene Literature," 35 STAT. 1138 (1909), 41 STAT. 1060 (1920), 18 U.S.C. § 1462 (1948); "Mailing Indecent Matters on Wrappers," 35 STAT. 1129 (1909), 18 U.S.C. § 1463 (1909); "Broadcasting of Obscene Matter," 48 STAT. 1901, 1100 (1934), 18 U.S.C. § 1464 (1948).

[11]Hamilton v. Rathbone, 175 U.S. 414 (1899); Richardson v. Harmon, 222 U.S. 96 (1911); United States v. Colorado Ry., 157 F. 321 (8th Cir. 1907); Hagler v. Security Mutual Life Insurance Co., 244 F. 863 (N.D. Texas 1917); United States v. One Package, 86 F.2d 737 (2d Cir. 1936); CRAWFORD, THE CONSTRUCTION OF STATUTES 431-437 (1940).

[12]18 U.S.C. c. 71 (1948).

[13]See note 10 *supra*.

[14]See note 10 *supra*, "Mailing of Obscene Articles."

statutes that Congress intended to prohibit the dissemination on an interstate level of all things which are obscene or indecent*

Roy C. Kuyrkendall, Jr.

Torts—Joint Liability for Independent Concurrent Acts of Negligence

Defendants were a sawmill operator and an electric power company who allegedly were negligent in allowing sawdust to pile up near a sagging wire of an uninsulated power line. Plaintiff's son was electrocuted while playing on the sawdust. Held: Tort feasors may be sued jointly for damages resulting from separate and independent acts if such acts concur to cause damage, though the acts of neither, singly, would have caused injury. *Clinton v. Gunn-Willis Lumber Company,* 49 S.E.2d 143 (Ga. 1949).

All the cases seem to agree on joint liability of defendants where two or more owe another a common duty, and by common neglect of that duty such other person is injured.[1] And where two or more persons act independently, diversely, and disconnectedly, but cause a single injury, all are jointly and severally liable.[2] These two rules harmonize with the *Clinton* case thus far.

Another line of cases takes an opposite view holding that there can be no joinder of tortfeasors when they act with no unity, concert, or common design.[3] The Mississippi court has taken this view in two cases.[4] This differs from the instant rule by which one defendant, however little he might have contributed to the injury, would be liable for all damages caused by wrongful acts of others, and he would have no remedy against them because no contribution can be enforced between joint tort feasors. It places the hardship of proving each individual's portion of damages on the plaintiff, although in fact there is but a single indivisible injury.[5]

The conflict over joint liability in these instances arises largely from difficulty of determining the extent of damage caused by each defendant. Some courts believe that it is better to make all defendants jointly liable than to put upon plaintiff the burden of proving damage caused by each defendant, when in fact damages are often inseparable. Others think that it is unjust to make one person liable for the acts of others simply because there is no means of determining the extent of damage by each defendant.[6]

The instant case establishes the broader rule of liability under which parties are jointly liable for independent negligent acts where injury would not have occurred but for the combined acts of both. It follows the majority rule in imposing a joint liability where there is no reasonable basis for the plaintiff to prove damages by each defendant.[7]

**Editor's note:* The instant case has been reversed by the United States Supreme Court subsequent to the time this comment went to press. United States v. Alpers, 70 Sup. Ct. 352 (U.S. 1950).

[1]Prosser On Torts 47 (4th ed. 1941).

[2]Weingand v. City of North Platte, 108 Neb. 17, 187 N.W. 90 (1922); 23 Minn. L. Rev. 109 (1938), commenting on Golden v. Lerch Bros., Inc., 203 Minn. 211, 281 N.W. 249 (1938).

[3]Miller v. Ditch Co., 87 Calif. 430, 25 Pac. 550 (1891).

[4]Masonite Corporation v. Burnham, 164 Miss. 840, 146 So. 292 (1933); King v. Ruth, 136 Miss. 377, 101 So. 500 (1924).

[5]Chipman v. Palmer, 77 N.Y. 51, 33 Am. Rep. 566 (1879).

[6]Cooley, Torts 86 (4th ed. 1932).

[7]Prosser On Torts 330 (4th ed. 1941).

The "foul atmosphere"[8] and "polluted stream"[9] cases are either distinguishable here on the basis of separate damages resulting from each individual's acts or consistent with the instant case.[10]

In the present case the saw mill operator negligently piled his saw dust aside and the power company negligently allowed its uninsulated power line to sag near the sawdust pile; but as in the flood water, polluted stream, and obnoxious gas cases, the acts were absolutely independent, unconnected by any imaginable common design, and were, for all intents and purposes, unrelated. Thus joint tort liability has been extended again beyond these few instances of independent actions.

Ellis Griffith

Torts—Parent and Child—Right of Child to Recover Damages From One Who Has Enticed Mother Away

Plaintiff, a minor of six, brought an action through her guardian, alleging damages sustained as a result of defendant's act of enticing her mother away from the family home. Defendant contended that plaintiff had no legally protected right as to the maintenance of a family relationship without interference by outsiders, and asserted that the common law provided no precedent for such an action. Held: Despite the novelty of the right and the lack of common law precedent, a child has a right of action against one enticing his parent away from the family home. *Miller v. Monsen,* 37 N.W.2d 543 (Minn. 1949).

In recent years, the courts have found themselves occasionally confronted with this question: Does an infant possess a legally protected right against a third person who causes his parent to neglect parental duty through desertion?

It appears quite evident that no such right existed at common law.[1] Quite probably its absence may be attributed to the status which the father and husband held in the medieval family. His was the position of lord and master; and the rights of all of the members of the family were merged in him. However, the law has not failed to recognize and respond to the many changes that the family has undergone. It is conceded that many rights formerly vested in the father and husband are now vested in other members of the family.[2] But an agreement among the courts as to the right of an infant against one enticing away its parent has not been achieved.

One must concede that a child has an interest in family relations; he has an interest in the society and affection of the parent, at least as long as he remains in the

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[8]Swain v. Tenn. Copper Co., 111 Tenn. 430, 78 S.W. 93 (1903); Chipman v. Palmer, *supra* note 5.

[9]Gallagher v. Kemmerer, 144 Pa. 509, 22 Atl. 970 (1892).

[10]Although many cases cited support the case at bar in principle, courts have found joint liability only where defendants acting independently have flooded plaintiff's property with water or oil, Chicago & Alton Ry. v. Glinney, 118 Ill. 488, 9 N.E. 203 (1886); Williard v. Redbank Oil Co., 151 Ill. App. 433 (1908); or polluted a stream, Bowman v. Humphrey, 124 Iowa 744, 100 N.W. 854 (1904); or discharged obnoxious gases into the atmosphere, *supra* note 8. See 62 C.J. 1135.

[1]Jones, Commentaries on the Laws of England by Sir William Blackstone, Kt. 1696 (1916 ed.).

[2]Betser v. Betser, 186 Ill. 537, 58 N.E. 249 (1900): Milliken v. Long, 188 Pa. 411, 41 Atl. 540 (1898); Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889); Waldron v. Waldron, 45 Fed. 315 (C.C.N.D. Ill. 1890).

household. Although authoritative writers admit the existence of the child's interest, some conclude that such an interest does not give a right of action.[3]

No early judicial decisions on this precise point appear to exist. The opinion was first advanced that an action for alienation of affections was "one which could arise only out and by virtue of the marriage relation."[4] In the 1923 case of *Coulter v. Coulter*,[5] the point under discussion here arose collaterally in relation to an adult child. That court expressly withheld its opinion.

In 1934, a case in point was raised in New York. *Morrow v. Yannantuono*[6] held that an infant could not recover damages for the enticing away and harboring of the infant's mother by a third party. That court felt that to rule otherwise would open the courts to a flood of litigation, for "every one whose cheek is tinged by the blush of shame would rush into court to ask punitive damages."[7] The Texas court followed the *Morrow* case in 1948.[8]

The development of this point of law has not been simply a matter of judicial discretion. By 1935, at least twelve states had by statute removed the right to bring an action for alienation of affections.[9] Therefore, a great portion of the litigation has centered about the constitutionality of such statutes. In several instances, courts have held such legislation to be constitutional.[10] On the other hand, such statutes have twice been considered unconstitutional, on the ground that alienation of affections involves rights which all members of a family should be allowed to protect.[11] On the strength of the latter, a similar right of action was later recognized, where no statute existed.[12]

The problem here seems to be a sociological rather than a legal one.[13] The principle case falls in line with the modern trend toward enlarging the remedies in the field of family relations; but the tendency on the part of legislatures to abolish actions for alienation of affections cannot be overlooked. There is a considerable difference in the attitudes of the courts and the legislatures on this problem. If the courts are to exercise this sociological function, they should proceed with the utmost caution and consideration.

William F. Goodman, Jr.

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[3]Prosser on Torts 937 (1941); Pound, *Individual Interests in the Domestic Relations*, 14 Mich. L. Rev. 177 (1916).

[4]Hamilton v. McNeill, 150 Iowa 470, 129 N.W. 480 (1911).

[5]73 Colo. 144, 214 Pac. 400 (1923).

[6]152 Misc. 134, 273 N.Y.S. 912 (Sup. Ct. 1934).

[7]273 N.Y.S. 912, 914 (1934).

[8]Garza v. Garza, 209 S.W.2d 1012 (Tex. 1948).

[9]Taylor v. Keefe, 134 Conn. 156, 56 A.2d 768 (1947).

[10]Pennington v. Stewart, 212 Ind. 553, 10 N.E.2d 619 (1937); Bunten v. Bunten, 15 N.J. Misc. 532, 192 Atl. 727 (Sup. Ct. 1937); Harfgarn v. Mark, 274 N.Y. 22, 8 N.E.2d 47 (1937).

[11]Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946); Daily v. Parker, 152 F.2d 174 (7th Cir. 1945).

[12]Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947).

[13]See Note, 162 A.L.R. 824 (1946).

RECENT BOOKS

COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE. By Jerome Frank. Princeton, N. J., Princeton University Press, 1949, pp. xii, 441. $5.00.

Here are some specific recommendations:[1] Present excesses of judicial trial by combat must be reduced by having the government see that all practically available, important evidence is introduced at the trial of a civil suit; by having trial judges play a more active part in examining witnesses; by discarding most of the exclusionary rules of evidence; and by providing liberal pre-trial "discovery" for defendants in criminal cases.

Legal education should be reformed by using practitioners more often as teachers, by revising the "myopic" and "sham" case-system so that cases are studied from the very beginning to the end, and by employing a legal dispensary or clinic with law students actually handling real and not hypothetical legal problems. Trial judges, prosecutors and police must be given special education in their vocations. Judges should abandon their official robes and conduct trials less formally.

Trial judges should in all cases publish special findings of fact. Jury trials should be abandoned except in major criminal cases. While the jury system lasts, modify it by requiring special verdicts in all jury trials, by using special juries, and by educating individuals for jury service. The trial judge should be permitted to sit on appeal from his decision, but not vote with the appellate court. There should be talking movies of trials, and non-lawyers should be taught to recognize that trial courts have more importance than the appellate courts.

And this interesting statement: "Encourage the openly disclosed individualization of law suits by trial judges." The legal rules should be revised to give express discretionary authority to trial judges, so that such individualization may be achieved openly and without subterfuge as done today.

Judge Jerome Frank's new book is an interesting combination of practical suggestions such as these, plus an elaborate rendition of his theories on the nature of judges, law and the judicial process, theories which he has presented frequently in previous writings.[2] With voluminous references to cultural anthropology, music, logical positivism, and gestalt psychology, among other things, Judge Frank states his thesis that certainly in the law, the ability to predict future decisions, is not to be obtained, not because of uncertainty in the legal rules laid down by trial or appellate judges but for more fundamental reasons. Fallible judges and juries listening to fallible and frequently lying witnesses under the emotional tension of trial by combat means that we do not know whether the facts that get into court are the true ones, nor can we ever know this. If the facts are going to remain in doubt, then the outcome will always be doubtful, regardless of the certainty of the legal rules. Judge Frank argues further that the inherent subjectivity of all human pursuits prevents our ever having a "science" of government or a "science" of law. There are no social sciences; they are but social studies.

What is the importance of recognizing our congenital inability to achieve certainty and predictability in the law? "Paradoxically, the calm acceptance of un-

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[1] A summary of these suggestions is given at p. 422.

[2] LAW AND THE MODERN MIND (1930); IF MEN WERE ANGELS (1942); FATE AND FREEDOM (1945).

avoidable imperfection improves our effectiveness. . . . Insofar as we become mindful that life must be less perfect than we would like it to be, we approach nearer to perfection. The impossibility of reaching it does not justify indifference to the aim of constantly bettering man's lot."[3]

In discussing stare decisis and precedents, Judge Frank states his belief that the doctrine of adhering to decided cases has always had a much harsher sound than effect, and judges have always mitigated its harshness by adroitly distinguishing cases. He concludes that there is real value to stare decisis, especially where a person has acted in reliance on a decision, and that no sensible person suggests abandoning the principle. But it is desirable that the theory underlying stare decisis and precedents be restated to conform more closely with precedent practice. It is desirable, not that judges should do what they are saying, but that they should say what they are doing. And it is at this point that a question might be raised.

In all of the pedagogical furor over the nature of law between the proponents of certainty, principle and stare decisis on the one hand, and the advocates of uncertainty, practicality and expediency on the other, it seems that the debaters can be divided into three groups: (1) Those who insist that exact certainty is desirable and attainable. These have been variously called reactionaries, absolutists, theologians, lawyers, Republicans. (2) Those who, glorying in uncertainty, insist on forgetting theories and working for attainable results. These have been variously called pragmatists, utilitarians, relativists, communists, New Dealers. (3) Those who like to point out that there is a gap between our principles and our practice, and who, realizing that the gap cannot be eliminated, urge that it be narrowed. Judge Frank, with his argument that we should make our theory of stare decisis conform *more nearly* to our practice of violating it, is probably a member of this group. Its guiding principle is that "It is socially undesirable to create a false appearance of legal certainty."[4] The question to be raised, then, is whether or not this last statement is correct.

Perhaps there is a fourth group, and its view seems to be the converse of the proposition as to the ill effects socially of a false appearance of certainty. It believes that it is both necessary and desirable to continue the appearance of legal certainty, although trial procedure makes it abundantly clear that there can never be any real certainty. It is as necessary that we continue talking as if a theoretical condition existed as it is desirable that we continue taking practical steps to subvert the theory. Our nature is two-fold, demanding unity and order in the same breath with diversity and independence; and the contradiction cannot be reconciled.

Thus this group believes that it is probably a waste of time to try to alter judges or anybody else so that they will either act as they talk or talk as they act. All must aspire to things that cannot be; and either the attainment of ideals, *i.e.,* certainty and predictability, or the becoming convinced that they are unattainable, would be equally disastrous. Consistency is the evil, the contradiction is the life-saver; and the law will be strengthened by learning to put up with it.

However irrelevant these cavilling remarks may turn out to be, it is worth noting that this book represents a solid achievement. It is true that Judge Frank tends to write a little longer than is necessary, and continuous quotation from many

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[3]p. 426.
[4]p. 133.

fields of reading at times makes the book appear more bibliographical than analytical; but throughout *Courts on Trial,* he is as stimulating and provocative as ever.

*Huey B. Howerton, Jr.**

INTRODUCTION TO INCOME TAXATION. By James M. Henderson. Rochester, N. Y., Lawyers' Coop. Pub. Co., 1949, pp. 536. $7.50.

This is a different and indispensable aid to the general practitioner engaged in handling occasional income tax cases. While the field of the tax manual is already well covered, Mr. Henderson's analysis shows the basic thinking and philosophy which is the foundation of the Income Tax Law, the decisions, the manuals and other sources. The general practitioner has always been plagued with his inability to find an analysis of the law which would fit his particular situation, and this ready reference to the problems incident and related to the Income Tax Law are fully covered. The review of each subject is fundamental and will give the general practitioner adequate ideas of the method of solving a particular problem.

The author's analysis of the income concept, and the subsidiary provisions which fall under it is clear, giving the reader an insight into the vagaries of capital and income. This is an important feature of the book because fundamentally the taxpayer, as well as the tax practitioner, is concerned with the differentiation between capital and income, principally because the Sixteenth Amendment provides only for a tax on income. Although the passage of this Amendment, as well as the Congressional acts which followed, have met with considerable opposition throughout the years, the Supreme Court has upheld repeatedly the power of Congress to impose income taxation. Out of authority of the Sixteenth Amendment came:

(1) The Internal Revenue Code and subsequent legislation by Congress.

(2) The Treasury Department Regulations interpreting, augmenting, and applying by illustration the Internal Revenue Code and statutes.

(3) The court decisions wherein the various federal courts have construed, applied, and passed upon the validity and meaning of the foregoing.

(4) Rulings and opinions of departmental officers and counsel, and acquiesence by the commissioner in court decisions. Henderson, beginning with the passage of this act, has discussed, chapter by chapter, its various provisions with annotations of court decisions interpreting the various sections.

The author does not consider or attempt to clarify income tax problems which have been compounded as a result of accounting transactions, and this is one particular pit into which the general practitioner not versed in income tax practice might fall.

The analysis of losses, deductions, and credits is comprehensive and leaves very little unreported, except for depletion, which the author avoids because of the complexities involved. This is understandable because the Congress has been wrestling with the subject of depletion since the early days of oil exploration in this country.

The parts dealing with the alleviation and avoidance of the tax, as well as with partnerships, estates and trusts, are well covered, with adequate citations. Family

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*University, Mississippi.

partnerships are treated by analysis of *Commissioner v. Tower*,[1] but a more recent decision permitting greatly expanded family partnership plans, *Culberson v. Commissioner*,[2] has not been discussed.

The author's analysis of corporate taxation shows a clear insight into corporate activity, extending into the realm of foreign corporations, banks, investment companies, insurance companies and associations taxable as corporations.

The general practitioner will find as always that some knowledge of the taxpayer's accounting system is necessary. The records of the taxpayer will enable him to determine from his own examination such elementary problems as whether there is a cash or accrual basis of accounting, whether the return is fiscal or calendar year, and whether the methods of accounting adopted by a particular taxpayer comply with the requirements of the act.

The author states that the aim of his book is to bridge the gap between the tax neophyte and the tax expert, so that the former can comprehend what the latter is talking about. This he has done well. His treatment of the Income Tax Act is easily understandable by the general practitioner or neophyte. It indicates his personal and thorough knowledge of a vast field of law, but the reader must necessarily keep in mind its limitations.

*Bernard Leonard Tighe, Jr.**

LABOR RELATIONS AND FEDERAL LAW. By Donald H. Wollett. Seattle 5, Wash., The University of Washington Press, 1949, pp. xxv, 148. $3.00.

Labor Relations and Federal Law, a recent book by Donald H. Wollett, is a simple, dignified, and readable discussion of one of the most controversial statutes of recent years, the Labor Management Relations Act of 1947 (Taft-Hartley Act). It is more than a mere translation of the statutory language into lay-language; it represents an attempt to discover and make clear the rationale underlying the various provisions of Taft-Hartley, both what they are and in some instances what Mr. Wollett would like them to be.

The particular value of this book seems to me to be the forthright articulation of Mr. Wollett's premises as to what our national labor policy is and what it should be. No very intelligent appraisal of Taft-Hartley can be made until it can be determined just exactly what it was supposed to be and what it was supposed to do. Until the premises upon which the statute is based are discovered, one cannot adequately evaluate the means adopted by its framers to carry out its ends. Of course any such discovery of a statute's basic policy amounts, in part at least, to an exercise in legislative psychoanalysis, but in the case of Taft-Hartley the job is somewhat simpler because the statute itself contains several statements of basic policy. This book is an examination into the means provided in the act to carry out that policy, where they do the job and where, in Mr. Wollett's opinion, they do not. Almost the entire statute is discussed, the most noticeable omission being any mention of the provisions providing for the establishment and operation of the Federal Mediation and Conciliation Service. But nearly all the rest is there, the national emergency, the closed shop, the jurisdictional dispute, the secondary boycott, the non-communist affidavit, the "right to sue" provisions are all explained and

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[1]327 U.S. 280 (1946).
[2]337 U.S. 733 (1949).
*Attorney at Law, Jackson, Mississippi.

evaluated. Mr. Wollett minces no words but he has kept the book most refreshingly free from the name-calling and slogan-bandying efforts of some of his fellow authors in the labor field.

No doubt many will disagree with both Mr. Wollett's statement of premises, interpretation, and conclusions about Taft-Hartley; it most certainly will not satisfy the extremists on either side. A reading of this book will, I think, enable both the supporters and opponents of Taft-Hartley to appreciate each other's position somewhat better. It will also furnish those essentially neutral onlookers of one of the most important struggles of our time with some thought-provoking ideas and opinions about this important statute. I think most anyone taking the short time required to read this book will feel the time to have been well spent.

*Walter Dunham, Jr.**

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*Associate Professor of Law, University of Mississippi School of Law.

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